



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

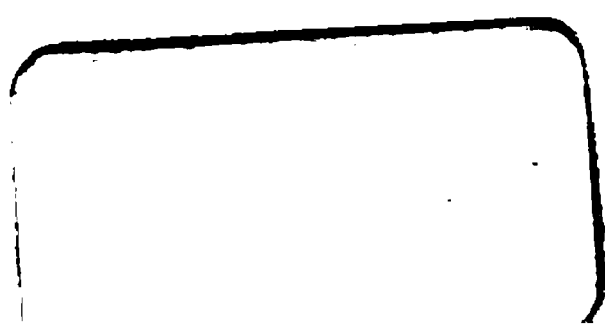
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





REPORTS
OF
CASES DETERMINED
IN
The Circuit Court of the United States,
IN AND FOR
THE THIRD CIRCUIT,
COMPRISING
THE EASTERN DISTRICT OF PENNSYLVANIA, AND
THE STATE OF NEW JERSEY.

BY HENRY BALDWIN,

One of the Judges of that Court.

"Sed melius et tutius est, petere fontes quam sectari rivulos."
10 COKE 41, a ; 117, b.

VOL. I.

PHILADELPHIA :
JAMES KAY, JUN. & BROTHER, 122 CHESTNUT STREET.
PITTSBURGH: JOHN I. KAY & CO.
1837.

Entered according to the act of congress, in the year 1837, by JOHN I. KAY, in the clerk's office of the district court of the United States in and for the eastern district of Pennsylvania.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

Philadelphia :
Printed by James Kay, Jun. & Brother,
122 Chestnut Street.

TO THE

HON. JOSEPH HOPKINSON.

I should do great injustice to my feelings, in submitting this volume to the profession, without testifying to them my sense of obligation to you, who have contributed so much to make its contents worthy of their approbation, not only by the opinions delivered by yourself, but in others, in which it has been left to me to give the result of our mutual labour and concurring judgment.

When we became associated in our judicial duties, we had an arduous task before us, the high character of the bar of the Circuit Court, and the nature of the causes depending therein, were in themselves just cause for apprehension; but there was still greater reason to be appalled, when we considered the reputation which that court had acquired and sustained for thirty years, under the administration of that eminent and most beloved judge who preceded me. The highest call was made on you, to bring into active requisition all the powers of your acute, discriminating mind, your cogent reasoning and sound judgment, as well as the large fund of legal information, acquired during a long and active course of professional experience, in the developement and application of the great principle of federal and state jurisprudence. If a more imperious call could be made on any one, it was on me to exert every faculty in a way more appropriate to your junior in years and practice; by a patient and laborious examination of the adjudged cases, and the analogies of the law, to so apply the test of precedents to principles, that while we followed the former, the latter should not be violated.

If this volume does not suffice to show that we have obeyed these calls by the execution of every talent at our command, and the just expectations of the public have been disappointed, we must submit to their opinion; having done our best, we are spared the pain of self reproach. But if we have in some degree so adjudicated the cases before us, as to have given reasonable satisfaction, or measurably preserved the character of the court, it has been by a singleness of object, its steady pursuit, and a happy union of opinion in our several judgment on the points adjudged, as well as in the illustrations and analogies on which our decisions were founded.

It has been to me a subject of pride and pleasure, that the cases in which we have been unable to agree in opinion, are fewer in number than the years of our judicial association; that when they have occurred it has been a subject of mutual regret, and each has been desirous of yielding to the other. When we were colleagues in another department of the government, we came in collision with less regret, owing perhaps to one stimulus, which neither of us now feel, or suffer to have any influence on our minds. The pride of victory is a strong incentive in political debate, in which none can engage without feeling its impulse; but however it may have operated on us during a discussion, it ended with it, and we always parted with the same mutual sentiment as we have since done after a judicial conference, when each felt compelled to adhere to his opinion, more diffidence of himself, and respect for the other.

While these are the relations between us, others will appreciate the reasons why I dedicate this book to you.

HENRY BALDWIN.

Philadelphia, December 26, 1836.

ABBREVIATIONS.

Acc.—Agrees.

Amb.—Ambler's Reports

And.—Anderson's Reports.

Andr.—Andrews's Reports.

Anst.—Anstruther's Reports.

Atk.—Atkyns's Reports.

B. & A.—Barnewall & Alderson's Rep.

B. & B.—Ball & Beatty's Reports.

B. & C.—Barnwell & Cresswell's Rep.

B. C.—Brown's Chancery Reports.

Bl. Com.—Blackstone's Commentaries.

B. & P.—Bosanquet & Puller's Reports.

B. P. C.—Browne's Parliament Cases.

Burr.—Burrow's Reports.

Br.—Brownlow's Reports.

Bunb.—Bunbury's Reports.

Camp.—Campbell's Nisi Prius Reports.

C. C. E.—Caine's Cases in Error (N. Y.)

Car.—Carey's Reports in Chancery.

Carr. C. L.—Carrington's Criminal Law.

C. C. or Ch. Cas.—Chancery Cases.

C. R.—Chancery Reports.

Ch.—Chitty's Reports.

Ch. C. L.—Chitty's Criminal Law.

C. & P.—Carrington & Paine's Reports.

Ch.—Chancellor.

C. P. or C. B.—Common Pleas.

Co. or C.—Coke's Reports.

Co. Inst.—Coke's Institutes.

Co. Lit. or L.—Coke on Littleton.

Com.—Comyn's Reports.

Com. Dig.—Comyn's Digest.

Comb.—Comberbach's Reports.

C. L.—Common Law Rep. by Serg., &c.

Conn.—Connecticut Reports.

Coop.—Cooper's Equity Reports.

Cowp.—Cowper's Reports.

Cond. Ch.—Condensed Chancery Rep.

Cond. Ecc.—Condensed Ecclesiast. Rep.

Cond. Ex.—Condensed Exchequer Rep.

D. C. D.—Comyn's Digest by Day.

D. or D. & E.—Durnford & East's Rep.

D. & R.—Dowling & Ryland's Reports.

Dall.—Dallas's Reports.

Dall. L.—Dallas's Laws of Pennsylvania.

Dav.—Davis's Reports.

Dess.—Dessaussure's Equity Rep., S. C.

Dom. Proc.—House of Lords.

Dono.—Dow's Parliament Cases.

Dy.—Dyer's Reports.

E.—East's Reports.

E. P. C.—East's Pleas of the Crown.

Ed. Inj.—Eden on Injunction.

E. C. A. or Eq. C. Ab.—Equity Cases Abridged.

F. N. B.—Fitzherbert's Natura Brevium.

Fitzg.—Fitzgibbons's Reports.

Freem.—Freeman's Reports.

Fonb.—Fonblanque on Equity.

Gal.—Gallison's Reports.

Gilb. R.—Gilbert's Reports.

Hard.—Hardress's Reports.

Harr. Pr.—Harrison's Chancery Practice.

Hob.—Hobart's Reports.

H. & M.—Henning & Munford.

H. Bl.—Henry Blackstone's Reports.

Halst.—Halstead's New Jersey Reports.

H. P. C.—Hale's Pleas of the Crown

J. & W.—Jacob & Walker's Reports

LIST OF ABBREVIATIONS.

- Jac.*—Jacob's Reports.
J. C.—Johnson's Chancery Reports.
J. Cas.—Johnson's Cases.
J. R.—Johnson's Reports.
Jenk.—Jenkins's Centuries.

Keb.—Keble's Reports.

L. R.—Lord Raymond's Reports.
Lev.—Levinz's Reports
Leo.—Leonard's Reports.
Lill. Pr. Reg.—Lilly's Practical Register.

M. & S.—Maule & Selwyn's Reports.
Madd. C.—Maddock's Chancery.
Mod.—Modern Reports.
Mas.—Mason's Reports.
Mass.—Massachusetts Reports.
Mos.—Moseley's Reports.
Marsh.—Marshall's Reports.
Mit.—Mitford on Pleading.
Mer.—Merivale.
Munf.—Munford's Reports.

Nels.—Nelson, or Fourth Chancery Rep.

Penna.—Pennsylvania Reports.
Penn.—Pennington's N. Jersey Reports.
Pl.—Plowden's Reports.
pl.—placitum.
Pop.—Popham.
Pr. Reg.—Practical Register in Chancery.
P. C.—Precedents in Chancery.
P. W.—Peere William's Reports.
Pet.—Peters's Reports S. C. U. S.
Pet. C. C.—Peters's Circuit Court Rep.
Pet. Ad.—Peters's Admiralty.

R. A.—Rolle's Abridgement.
Ro.—Rolle's Reports.
Rand.—Randolph's Reports.
Rob. Ad.—Robinson's Admiralty Rep.
R. & M.—Ryan & Moody's Reports.
R. & R.—Russel & Ryan's Reports.
Russ.—Russell's Reports.

Sal —Salkeld's Reports.
Say.—Sayer's Reports.
Sho.—Shower's Reports.
Sho. P. C.—Shower's Parliamentary Cas.
Sh. & Le.—Schoale & Lefroy's Reports.
S. C.—Same Case.
S. P.—Same Point.
S. & R.—Sergeant & Rawle's Reports.
S. & S.—Simon & Stewart's Reports.
Str.—Strange's Reports.
Sty.—Styles's Reports.
St. Tr.—State Trials.

T. R.—Thomas Raymond's Reports.
Tal.—Talbot's Cases in Equity.
Tot.—Tothill's Chancery Reports.

Vern.—Vernon's Reports.
Vin.—Viner's Abridgement.
V. Sr.—Vesey's (Senior) Reports.
V.—Vesey's (Junior) Reports.
V. & B.—Vesey & Beame's Reports.

Wash.—Washington's Circuit Court Rep.
Wash. Va.—Washington's Virginia Circuit Court Reports.
W. Bl.—William Blackstone's Reports.
Wh.—Wheaton's Reports.
Wils.—Wilson's Reports.

LIST OF CASES REPORTED.

Askew v. Odenheimer. <i>Trust. Rules of Equity in Odium Spoliatoris,</i>	380
Bainbridge v. Wilcocks. <i>Interest. Stated Accounts,</i>	536
Bains v. The Schooner James and Catherine. <i>Admiralty Jurisdiction,</i>	544
Baker v. Biddle. <i>Equity Jurisdiction,</i>	394
Barr and Auchincloss v. Simpson. <i>Jurisdiction,</i>	543
Bennett v. Boggs. <i>Fisheries in the Delaware,</i>	60
Blydenburgh and Burns v. Welsh. <i>Sale of Goods,</i>	331
Bonaparte v. The Camden and Amboy Railroad Company. <i>Injunction,</i>	205
Bullock v. Van Pelt. <i>Plea of non est Factum,</i>	463
Burr v. M'Ewen, Hale and Davidson. <i>Trustee,</i>	154
Castor v. Wood. <i>Amendment of Answer,</i>	289
Cushman v. Waddell. <i>Evidence. Assault and Battery,</i>	57
Delauney v. Hermann. <i>Equity Practice,</i>	132
Fisher v. Rutherford. <i>Amendment of Bill,</i>	188
Gardener v. Wagner. <i>Will,</i>	454
Hall v. Perott and Cabot. <i>Special Jury and Venire,</i>	123
Harman v. Harman. <i>Refunding Bonds,</i>	129
Johnson v. Tompkins and others. <i>Fugitive Slave. Trespass,</i>	571
Leland v. Wilkinson. <i>Seal of a State,</i>	607
Livingston, Lessee of v. Moore et al. <i>John Nicholson's Estate,</i>	424
Magniac v. Thompson. <i>Marriage Settlement. Fraud,</i>	344

Merrill and Foster v. Rinker. <i>Witness. Fraud. Trover,</i>	528
Murati v. Luciani. <i>Handwriting,</i>	49
Ogden and Co. v. Gillingham and Co. <i>Bill of Exchange,</i>	38
Pacific Insurance Company v. Conard. <i>Trespass,</i>	138
Parker v. Nixon. <i>Commission,</i>	291
Reading v. Blackwell. <i>Devise. Legacy,</i>	166
Reed v. Ross. <i>Plea to Action of Debt,</i>	36
Rinehart v. Harrison's Executors. <i>Devise. Legacy,</i>	177
Scott v. Blaine. <i>Final Decree,</i>	287
Sheepshanks, Lessee of v. Boyer. <i>Ejectment,</i>	462
Stockton v. Throgmorton. <i>Bail,</i>	148
Thibault and Brothers v. P. De Basavilbaso. <i>Insolvent Law,</i>	9
Thompson, Lessee of v. Phillips. <i>Marshal's Sale. Lien of Judgment,</i>	246
Tilghman v. Tilghman's Executors. <i>Marriage Contract. Answer,</i>	464
United States v. Benner. <i>Foreign Minister. Indictment,</i>	234
United States v. Twenty-four Coils of Cordage. <i>Revenue Law,</i>	502
United States v. Doeblcr. <i>Forgery. Evidence,</i>	519
United States v. Hinman. <i>Forgery. Variance. Evidence,</i>	292
United States v. Kessler. <i>Piracy. Robbery,</i>	15
United States v. Mitchell and Fisher. <i>Forgery,</i>	366
United States v. Roudenbush. <i>Forgery. Evidence,</i>	514
United States v. Shellmire. <i>Forgery. Indictment. Perjury,</i>	370
United States v. Shive. <i>Constitutionality of Bank of United States. Charter,</i>	510
United States v. Wilson and Porter. <i>Mail Robbery. Evidence,</i>	78
Westbrooke, Lessee of v. Romeyn. <i>Deed. Limitations,</i>	196
Whitney v. Emmett. <i>Patent,</i>	303
Wilson v. Fisher's Executors. <i>Jurisdiction,</i>	133
Woodhull and Davis v. Wagner. <i>Insolvent Laws of States,</i>	296

Circuit Court of the United States.

PENNSYLVANIA, OCTOBER TERM 1828.

BEFORE

HON. JOSEPH HOPKINSON, District Judge.

THIBAUT & BROTHERS v. P. DE BASAVILBASO.

The plaintiff sold to the defendant certain goods in Philadelphia, and at the same time delivered to him other goods to be disposed of at Havanna, on account of the plaintiff. The defendant took all the goods to Havanna and there pledged them as a security for money advanced to him; on his return to Philadelphia, this suit was commenced against him. This action was on the case, but no declaration was filed. So it stood when a judgment was entered generally; afterwards, by an agreement between the parties, the judgment was confessed on the record to be for a certain sum, and notes were taken for the amount, payable at distant periods, and execution stayed accordingly. After these arrangements were made, the defendant was duly discharged by the insolvent laws of Pennsylvania, and after his discharge, the plaintiff filed his declaration in the above suit in trover, and charged the defendant with a tortious conversion to his own use, of the goods in both invoices; the alleged tort was the pledging of the goods at Havanna. If on these facts the plaintiff had originally an election to bring his suit on the contracts or for a tort, yet as it clearly appears by the whole course of proceeding that he had proceeded upon the contracts, he cannot, by filing under these circumstances a declaration in trover, turn his suit into one for a tort. The contract and promises having been made in Philadelphia, by persons resident here, and to be executed here, the rule for the *exoneretur* was made absolute.

SUR rule to show cause why an *exoneretur* should not be entered on the bail piece; the defendant having been discharged by the insolvent laws of Pennsylvania.

[Thibault & Brothers v. Basavilbaso.]

The material facts of this case are :

On the 29th of March 1828, the plaintiffs sold to the defendant a quantity of jewellery amounting to \$172 dollars, and on the same day delivered to him other jewellery to the amount of 2160 dollars, which by an entry on the plaintiffs' books are declared to be "goods sent by Mr Basavilbaso to be sold for Thibault & Brothers, or to be returned, if they are not sold for the invoice prices; Mr Basavilbaso to pay all expenses, and run all risks, for the profits arising from the same, over and above the invoice price."

On the 1st of April following, the plaintiffs received from the defendant a draft and note amounting together to \$172 dollars, and in the receipt given for them they agree, that should any part of the jewellery, per invoice of the same date, be returned to them within six months, in like good order, to receive the same on account of the above mentioned draft and note; all the goods thus obtained from the plaintiff, that is the invoice of 2160 dollars as well as that of \$172 dollars were shipped to Havanna by Vezin and Von Longerke, merchants of this city, consigned to the defendant, by whom the insurance and all other expenses were paid; he probably went in the same vessel with the goods to Havanna, where he received the jewellery, and deposited both invoices into the hands of Messrs A. Morales & Co., merchants of Havanna, as security for 2000 dollars advanced to him on account of the said jewellery.

On the 7th of October 1828, the defendant having returned, this suit was brought against him, generally, in case, and bail demanded in the sum of 5000 dollars, but no declaration was filed. On the 22d of December 1828, an agreement was signed by the plaintiffs' attorney, and by the defendant confessing judgment for the sum of 1700 dollars to be paid by equal instalments, in one, two and three years, execution to be stayed accordingly, and the judgment was entered on the same day conformably to the agreement, no declaration being yet filed. This sum of 1700 dollars is the balance stated to be due from defendant to plaintiffs on an account which is dated on the same 22d of December; and on the same day the plaintiffs gave a receipt to the defendant, for three notes bearing date at Philadelphia, on the 20th day of December 1828, and payable severally in one, two and three years, and declared to be "for balance of 1700 dollars due them on account." As these notes bear a date two days antecedent to that of the account on which this balance is struck; they must either have been antedated, or the amount must have been settled by the par-

[Thibault & Brothers v. Basavilbaso.]

ties before the account was actually stated in form. They are, however, expressly declared to be for the "balance due them on account," and however we may connect them with the judgment, whether the judgment was given to secure them, as the defendant asserts, or they were a means of obtaining satisfaction of the judgment, as the plaintiffs contend, still we cannot doubt that the sum or debt for which both the judgment and the notes were given, was the balance of 1700 dollars, settled by the parties in the account of 22d December 1828 ; the dates are the same ; and where was this sum of 1700 dollars, mentioned in the judgment, in the notes and in the receipt given for the notes, found and ascertained to be the amount of the debt due to the plaintiff, unless in the account settled on the 22d of December 1828 ?

On 31st March 1829, three months after these arrangements were completed, the plaintiffs paid to Morales & Co. the money, with additional charges, amounting together to 2400 dollars, for which the jewellery had been pledged by defendant ; and by referring to the account of 22d of December, it will be seen that a credit is allowed to the defendant, of 4200 dollars, amount of jewellery at Havanna, and a charge is made against him for the money which had been advanced to him on the jewellery by Morales & Co., with the expenses ; by which it is evident that on the settlement made on the 22d December, the plaintiffs assumed the debt due from defendant to Morales & Co., and that the whole goods deposited by defendant, as well those which were absolutely purchased of the plaintiffs as those which were sent to be sold under the agreement mentioned, were passed to the plaintiffs.

All matters having been thus arranged between the parties, the balance due to the plaintiff ascertained, notes given for the payment of it, and a judgment entered on the suit according to their agreement and in conformity with the notes ; the formality of filing a declaration, which surely was incumbent upon the plaintiffs, and of course the neglect was theirs, had never been attended to. On 29th October, the defendant having complied with the requisitions of the law, was duly discharged as an insolvent debtor, by the court of common pleas of Philadelphia county.

On November 13th, 1829, the plaintiffs' attorney filed his declaration, in which he charges the defendant, as his cause of action in this suit, with having converted and disposed of the jewellery contained in both invoices, to his own use ; and the action which until this time,

[Thibault & Brothers v. Basavilbaso.]

nearly eleven months after the judgment, had stood on the docket with the equivocal description of an action *on the case*, now assumes the character of an action of trover, for a tortious use or conversion of the property of the plaintiff at Havanna, in the island of Cuba.

All the contracts between these parties, in relation of these goods, were made at Philadelphia, some before the goods were shipped and some after return of defendant to this country ; and, of course, if the judgment, which is now the debt of the defendant to the plaintiffs, is to be considered as a judgment rendered in an action of assumpsit, or on the contract and promises between the parties, the discharge by the insolvent laws of the state will operate upon it ; but if the transactions at Havanna must be taken as the ground of the suit and its judgment, a different result would follow ; and the discharge of the defendant will not avail him against it.

Whether by the peculiar agreement under which the jewellery contained in the invoice of 2160 dollars was delivered to the defendant, to be taken to Havanna entirely at his expense, and at his risk—to be indeed at his risk after their arrival at Havanna, whether sold or not sold, with a full right to all the profits that might be made on them above the invoice price, whether such an agreement did not place these goods entirely at the disposal of the defendant, he being always accountable for the invoice price—or, at least, whether they were not placed so indefinitely in his power, that the use he made of them in common with his own, could not be considered to be a wrongful disposal of them, a tortious unauthorized conversion of them to his own use, and make him responsible in an action of trover, I do not find it necessary to decide. If on the whole transaction the plaintiffs had an election to proceed against the defendant on their contract, or on the tort, by assumpsit or in trover, and I am well satisfied, that, in point of fact, it clearly appears they made their election, that they did bring their suit and enter their judgment on the promises and not on the wrong ; it cannot be permitted to them to undo what they have so solemnly done, on an unexpected turn of events, to give a new character to all their proceedings ; to throw up as nugatory, the settlement deliberately made with the defendant—the notes received from him in payment of the amount agreed to be due, which have no possible reference to or connection with any wrong, but a clear and direct connection with the settled account, and to set up a claim for damages arising from a tort committed at Havanna—to allege that the judgment rendered, in an evident con-

[Thibault & Brothers v. Basavilbaso.]

nection with the above mentioned account and notes, was in truth a judgment confessed for damages for the alleged wrong at Havanna.

The whole proceeding and documents show, beyond the reach of doubt, that the judgment was given for an amount found due on the whole dealings between the parties, comprehending not only the goods said to have been converted, but those also which were absolutely sold to the defendant and subject wholly to his disposition, and even other articles not found in either of the invoices now in controversy. I cannot raise a question that this judgment was taken on this settlement of all matters between the parties, and cannot be applied to the wrong said to have been committed by defendant with the goods which form but a part of the account settled ; and if as to those goods the plaintiffs can have a right of action in trover, it was merged or surrendered on their subsequent dealings and agreements with the defendant. By those they consented to take back to themselves the property they allege had been illegally converted by defendant to his own use ; and further, to charge themselves with the payment of the money he had taken up on them ; they have assumed the debt due by the defendant to Morales & Co., and they have in consideration of this obtained a right to receive from Morales & Co., not only the goods which they say belong to them, but a larger amount of other goods to which they had no claim. They have adopted the whole transaction between the defendant and Morales & Co., and this arrangement was afterwards fully completed and carried into effect, by their paying the amount due to Morales & Co., and receiving from them all the goods deposited by the defendant. Their right of recovery in an action of trover was limited to the amount of the invoice of 2160 dollars ; but they have received in consequence of their agreement or compromise with the defendant the sum of 4200 dollars, and still retain it ; can they be permitted to have the whole benefit of this arrangement and afterwards to repudiate a part of it ? May they now affirm the part which has been so beneficial to them, and reject the rest ? Their debt or claim upon the defendant, under both invoices, was 5332 dollars. This they have fortunately reduced to 1700 dollars by the voluntary delivery to them by the defendant of goods to which they do not and cannot pretend a claim, and shall they now keep these goods and reject the agreement on the faith of which they obtained them ? Was this the understanding of the parties, or any of them, when the arrangement was made and the judgment confessed ? If this were intended to

[Thibault & Brothers v. Basavilbaso.]

be a judgment in an action of trover, for the wrongful conversion of goods of the value of 2160 dollars, how were the damages put at 1700 dollars ; and who can say that this amount is due on the invoice of the goods actually sold, or on that of the goods sent to be sold for the plaintiffs ? It is undoubted that the goods said to have been converted have actually been returned to the plaintiffs ; and although they did pay upwards of 2000 dollars to obtain them, yet they also obtained other goods of a greater value than all they paid.

Being entirely satisfied that the judgment entered in this case, and against which the bail in the action seeks to be relieved by reason of the discharge of the defendant under the insolvent laws of this state, is a judgment confessed and rendered on assumpsit, or contracts and promises made at Philadelphia, and not in a foreign state, I direct that the rule for an exoneretur be made absolute.

Circuit Court of the United States.

PENNSYLVANIA, OCTOBER TERM 1829.

BEFORE

HON. JOSEPH HOPKINSON, District Judge.

UNITED STATES V. HENRY KESSLER.

The defendant was indicted for robbery and piracy on the high seas, on board a brig called "L'Eclair," a foreign vessel, belonging exclusively to French owners, and sailing under the French flag: *Held*, that under the acts of congress of the United States, this court has no jurisdiction to try and punish the offence.

Whether the offence was committed within or without a marine league of the coast of the United States, is of no importance to the question of jurisdiction.

Testimony of an accomplice how to be regarded.

THE indictment contains four counts: The 1st charges, in substance, a robbery from the captain of the vessel called "L'Eclair;" 2d. Stealing the same property from and out of the vessel belonging to certain persons unknown; 3d. With piratically running away with the vessel and with the goods, &c. belonging to persons unknown. The 4th lays the running away with the vessel and stealing the goods to have been within a marine league of the coast of the United States.

Mr Dallas, for the United States.

Defendant is charged with a piracy; that is, a felony committed on the high seas. Piracy is of two kinds: 1st. General piracy by

[United States v. Kessler.]

the law of nations ; 2d. Particular, created by the acts of congress. The defendant does not fall within the first description. He is indicted as a citizen of the United States, for violating the laws of the United States. 1. These laws are co-extensive with the national country of the United States, which extends a marine league from the coast ; 2d. With the flag of the United States ; 3d. Over the persons of the citizens of the United States, wherever they may be.

There are two acts of congress applicable to this case : that of 15th of March 1820, sect. 3, 3 Stor. Laws 1798 ; that of 30th of April 1790, sect. 8, 1 Story 84.

Mr Dallas gave a full account of the facts of the case which will be given in evidence.

He proceeded to the examination of the witnesses on the part of the United States. In the course of the examination of John Battiste, who was on board of the vessel, he was about to detail all the circumstances of the transaction, the manner in which the vessel was taken possession of by the crew, and what there was done by them in the prosecution of this design.

Mr Brewster, for the defendant, objects to any evidence in relation to the murders mentioned by the district attorney in opening the case. He said that there are three bills of indictment found against the defendant. 1. For murder, containing three counts ; 2. For piracy, with four counts ; 3. For a misdemeanour. The murder, if any was committed, constitutes a distinct and substantive charge, for which the defendant must answer on the trial of the indictment for that offence.

Mr Dallas replies, that he has a right to give in evidence all that took place on board of the vessel.

THE COURT. One of the charges now on trial is, that the defendant piratically and feloniously ran away with the vessel. To prove this the acts which accompanied it may be given in evidence ; it must be shown, not only that he did run away with the brig, but that he did it piratically and feloniously ; and this can be shown only by the circumstances attending the transaction. How did he run away with the vessel ? For what purpose ? How did he get possession of her ? How take her from those who had the lawful

[United States v. Kessler.]

possession of her? Was it by violence, or otherwise? with the consent, or against it, of the master? The manner of their taking possession is of the very essence of the charge. Suppose the crew had assaulted and confined the captain, and then taken the vessel, could it be argued that this was a distinct offence in itself, and therefore could not be given in evidence?

The evidence was admitted.

Before the termination of the examination of this witness, the court adjourned. The district attorney and the counsel for the prisoner, agreed that the jury might separate; the court gave no order or opinion on the subject, but left it entirely between the counsel.

The testimony given by several witnesses, on the part of the prosecution, being closed,

Mr Brewster, for the defendant, said that he had no evidence to offer. He stated his ground of defence:

1. That the evidence has not made out a case of general piracy, but that the defendant, if guilty of any thing, is guilty of a piracy, made so by the acts of congress.

2. That the power to define and punish piracy, given to congress by the constitution, does not extend to any vessel under any flag but that of the United States, although the offender be a citizen of the United States; that this being a French vessel, and the defendant a mariner on board of her, he had, for the time being, expatriated himself, and if guilty of any offence, can be punished only by the laws of France; that there is no evidence that the defendant is a citizen of the United States; that the vessel was not scuttled, nor the robbery committed within a marine league of the coast of the United States, and if they were, yet the acts of congress do not make such acts piracy; that the indictment is imperfect and insufficient; there is no averment that the vessel was American; it is necessary to aver that the defendant is an American citizen, and that the owners were Americans.

Mr Dallas, for the prosecution.

As to the marine league, the original act being done on the high seas, common to all nations, cannot divest the owners of their property, or give security for the perpetrators of the crime. The ownership remained when the vessel was brought within the juris-

[United States v. Kessler.]

diction of the United States ; they were divested of their property by scuttling the vessel, and not until then ; and this was done within the marine league. Like the case of stealing in one county and taking the goods into another ; every detention is a fresh taking.

The act of congress on which this indictment was framed, was passed 15th of May 1820, sect. 3, subsequent to the decisions of the supreme court, and was meant to embrace the cases before omitted as offered by those decisions. This law has a more comprehensive phraseology than the law of 1790 ; “ *any person* in and upon *any* ship or vessel ;” that part of the indictment which relates to running away with the vessel is founded on the act of 1790.

If the fact can be established that the crime was committed within a marine league of our coast, there can be no doubt of the jurisdiction ; this is within the territorial limits of the United States. Vattel, b. 1, c. 21, p. 204, sect. 288, 295 ; Vattel, b. 2, ch. 7, sect. 84 ; 1 Azuni 204 ; Church v. Hubbard, 2 Cranch 234 ; 1 Gall. 62 ; 3 Story’s Laws of 1798 ; act of 1820 ; Palmer’s Case, 3 Wheat. 630. I agree that the general words of the law of 1820 must have some limitation and restriction, to places and persons over which the legislative power of the United States extends. Foreign territory and foreign vessels, as an extension of that territory, are beyond our legislation, but American citizens are subject to it wherever they are. Vattel, b. 2, ch. 8, sect. 107, 108, 111. It is true that this reasoning may make the defendant amenable to another jurisdiction, but cannot throw off this. 3 Wheat. 610, 630, 641 ; 5 Wheat. 144 ; Klintock’s Case, 147, 152 ; 5 Wheat. 195 ; United States v. The Pirates, 5 Wheat. 184, 192 ; United States v. Furlong 197, 198 ; United States v. Holmes, 5 Wheat. 412.

Mr Brewster, for the defendant.

There are four counts in the indictment ; in some of them defendant is not stated to be a citizen of the United States. The charge is for piracy, not robbery or murder. Piracy is not a common law offence, or punishable by the courts of common law. 7 Dane’s Ab. 88 ; art. 6, sect. 2 ; 1 Br. Adm. and Civ. Law 461 ; Vattel, b. 1, ch. 23, sect. 280 ; 4 Bl. 71, 73 ; Act of March 1819 ; 3 Story’s Laws 1739. The piracy is charged under the acts of congress. It is admitted that the vessel was altogether French, sailing under the French flag.

As to the marine league. If the vessel was French, the offender

[United States v. Kessler.]

was out of the jurisdiction of the United States, as much as if the crime had been committed at Bourdeaux; but the vessel was not within fifteen miles of the shore until dark; at dark they took their course for the light-house. As to bringing the property within the United States; it is not like the case of taking it from one county to another; the principle does not apply to the case of carrying the stolen goods from one state to another.

The vessel was a distant floating colony of France; 1 Story's laws 86, Act of April 1790, sect. 16; thus if the act was done within the United States, it should be punished as a larceny, as within the body of a county, not as a piracy on the high seas. As to state rights, 6 Dane's Ab. 359, sect. 18; as to the admiralty jurisdiction, Ibid. 356, art. 11, sect. 13, 14, 15, 16.

The United States have a jurisdiction within the limits of any state or over offences committed within the body of any county of a state, only on the subjects specially mentioned in the constitution.

The acts of congress contemplate no piracy unless it is committed on the high seas, or on board of some public vessel, or a vessel owned by citizens of the United States. The words *any person* and *any vessel* are used in every section of the act of 1790; sect. 2, treason; sect. 18, perjury; sect. 20, bribery. Palmer's Case, 3 Wheat. 610; United States v. Howard et al., 3 Wash. C. C. 344; 7 Dane 93, sect. 11, 92, 9; Vattel, b. 1, ch. 23, sect. 281, 289; Ibid., b. 2, ch. 8.

Defendant by enrolling himself as one of the crew of the vessel submitted himself to the laws of France regulating its commerce.

The act of 1825 was intended to meet the decision in Wiltberger's Case; if congress had intended to change the law as given in Palmer's Case by the supreme court, they would have been equally clear and explicit in doing it. The Pirates, 5 Wheat. 186, 195. Judge Johnson says, that Palmer's Case covers the case of an American as well as a foreigner on board a foreign vessel. Holmes's Case, 5 Wheat. 416; as to citizenship of defendant, 1 Caine 59; Coxe's Dig. 432, sect. 224.

If defendant has committed any offence it is against the law of France; such cannot be punished here; Chief Justice Tilghman so decided in the case of a murder committed in Ireland.

As to the facts, the evidence is insufficient for a connected conviction; United States v. Ross, 1 Gall. 624; United States v. Vogle, 2 Dall. 347; Phill. on Ev. 79.

[United States v. Kessler.]

Mr. Dallas replied :

The acts of April 1790, of March 1819 and May 1820, were passed to meet the decision in Howard's Case, which, for the first time, denied the jurisdiction of the courts of the United States of a general piracy. There are no words in the act of 1820 to restrict the construction as in the act of 1790.

Why enact the law of 1820, if it is the same with that of 1790? There has been no decision on the law of 1820; it is now to be decided for the first time.

Replies to Mr Brewster's observation on the facts and evidence of the case.

THE COURT adjourned.

On Friday morning, October 23d, Judge HOPKINSON delivered the following charge to the jury.*

It is a matter of much anxiety and regret to me, and I doubt not to you, that we are deprived of the aid of the learning and experience of the presiding judge of this court, in the trial of this cause; and if any arrangement could have been made by which the numerous and important questions of law that have been agitated, could have been reserved for his opinion, and, if necessary, carried to the supreme court, it would have been very agreeable to me. But the same law which authorizes a single judge to hold this court, makes it his duty to do so whenever required. The defendant has put himself on his trial before us, and he has a right to your judgment and mine on his whole case. Our course is a plain one. We must render that judgment honestly and fearlessly, according to our own consciences and true opinion; and, doing this, we shall be acquitted of any wrong, even if we fall into error, and stand justified to ourselves and our country.

In the indictment now submitted to you, Henry Kessler, the prisoner at the bar, stands charged with four distinct offences; and your verdict, governed by the evidence and law of the case, will decide whether he is guilty or innocent of all or any of them. It is put beyond all doubt that a fearful crime has been committed, which, indeed, has seldom been exceeded in deep malignity and reckless cruelty. It is our duty, nevertheless, to inquire, with a deliberate

* Judge Washington was confined to his lodging by sickness.

[United States v. Kessler.]

and just impartiality, whether the defendant was an actor in the bloody scene, what part he took in it, and whether we have a warrant and authority to bring him to an account for it. The first inquiry will be determined by the evidence you have heard; and the second, by the law of the land, to which we all owe an implicit obedience.

The indictment contains four counts :

The *first*, in substance, charges that the prisoner, upon the high seas, with certain persons unknown, on board of a brig or vessel called *L'Eclair*, made an assault upon the master of the said brig, put him in fear, and robbed him of certain goods and moneys belonging to him.

The *second count* charges the robbery to have been of the goods, effects, and moneys of persons unknown, and committed within a marine league of the coast of the United States.

The *third* charges the prisoner with piratically and feloniously running away with the said brig, and with certain goods, moneys, and effects belonging to persons unknown.

The *fourth* and last count charges the running away with the vessel and the stealing of the goods to have been done within a marine league of the coast of the United States.

It appears that in November last (1828), the brig *L'Eclair* was in the port of Philadelphia, when the defendant, with five other persons, shipped on board of her as mariners. There were besides on board, the captain, a mate, and a young Frenchman. The vessel sailed from Philadelphia for Goree, in Africa, where she arrived, and remained about a month,—she sailed from Goree to Cayenne, and arrived safely there; and remained there about six weeks. At this place the mate, who sailed with her from Philadelphia left her and another was taken in his place: but all the other persons who went out in her, were on board when she sailed from Cayenne.

For the occurrences that happened after the vessel left Cayenne, including the horrible transactions which have brought the prisoner to the bar, we are compelled to rely on the testimony of John Battiste who was cook and steward of the brig, and is the only witness produced to give an account of them.

Before I call your attention to the circumstances and facts testified by this witness, it will be well to explain to you the rules of law by which his credibility may be tested. John Battiste was on board the brig when the enormities were committed; he received, by fear and

[United States v. Kessler.]

compulsion, as he says, a part of the plunder ; he made no discovery of the crime on his arrival in the United States, but appropriated the money he had received to his own use, telling a falsehood as to the manner in which he had obtained it ; and disclosing what he now has sworn to be the truth, only on being arrested and charged with the crime. Still we are hardly authorized to say he is an accomplice ; he has made no such confession, nor is he charged as such in the bill before us. If, however, his evidence is to be considered as that of an accomplice, which is putting it in its worst light, it does not follow that it is to be disbelieved. The law, founded not only on good policy but on good sense also, admits such evidence to be competent, and then endeavours by certain wholesome and reasonable restrictions to guard the innocent from injury from witnesses in such suspicious circumstances.

It is certainly true that when a witness is admitted to be competent, his credibility rests entirely with the jury, who may therefore convict upon the testimony of an accomplice, though unsupported by any other proof, and if they conscientiously believe him, it is their duty to do so. This, however is seldom the case ; and it is usual for the court to advise a jury not to regard the evidence of an accomplice unless he is confirmed in some parts of his evidence by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be, virtually, to exclude him, inasmuch as the confirmatory evidence proves of itself those parts it applies to. If he is confirmed in material parts, he may be credited in others ; and the jury will decide how far they will believe a witness, from the confirmation he receives by other evidence ; from the nature, probability and consistency of his story ; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.

The credit which shall be given to the evidence of John Battiste, is unquestionably of primary importance in the decision of this cause. It is from him only we have the details of the awful crimes which sacrificed three unoffending victims to avarice and cruelty, and of the part taken by the several actors in this bloody tragedy. He avers his ignorance of this conspiracy, he denies any participation in it, and pretends that his acquiescence was owing to menaces and fear of his own life. On the other hand, we find him receiving, reluctantly, he says, his share of the plunder ; coming off from the vessel in apparent good fellowship with the murderers and robbers. He

[United States v. Kessler.]

comes with them all to Brooklyn, a considerable town, opposite to New York ; he goes into that city with the present prisoner ; he comes on to Philadelphia, and proceeds to Cape May, the place of his residence, never giving the slightest hint of the crimes he had seen committed, nor taking a step to have the offenders brought to justice. On the contrary, he sits himself down quietly to enjoy his portion of the plunder ; he buys land, and makes other purchases with the money, and in short appropriated it to his own use, as if it were honestly his own. In addition to this, he told a falsehood to those who inquired how he obtained so much wealth, saying he got it from his sister in the West Indies. All this weighs heavily upon him ; and for the part he really took in the murder and robbery, if he took more than he has avowed, he must answer not only to the justice of this country, but to a more awful tribunal hereafter. Notwithstanding all this, he may have told the truth to you, and under circumstances and with corroborations which will entitle him to belief. At most, the circumstances I have alluded to against him, only prove him to have been a full accomplice in the crime ; but it is often only from such witnesses, and sometimes the worst, that great crimes are discovered and punished. How, then, is this witness corroborated by other unimpeachable evidence ? His account of the men on board ; the manner and place of their shipping ; of the voyage, cargo, and other facts less important, all appear to be strictly correct. He is further confirmed by an overwhelming fact in this business. This brig sailed from Cayenne in March last ; and from that time we have heard nothing of her except from John Battiste. Had she perished at sea, with all her crew, we should not see Battiste and Kessler here. If the vessel was lost and the men saved, it would have been easy for the defendant to have given some proof of the fact. But none has been attempted. The vessel is gone, and the men are here. Again ; a pair of pantaloons, sworn to belong to the captain, not only by Battiste, but by two most respectable witnesses, are traced to the possession of the defendant ; and he was bold and callous enough to wear them as his own. Add to these the money he had, in considerable quantities, consisting of peculiar foreign coins, the same as those plundered from the vessel ; and last of all, his admission that he helped to throw the captain overboard, and that in this Battiste had told the truth. Assuredly these are corroborations of a strong character of the evidence of John Battiste ; and the more so, as the prisoner has not attempted, by a particle of evidence, to

[United States v. Kessler.]

repel or explain any of these circumstances, nor to contradict any part of Battiste's evidence.

With these remarks, the evidence of J. Battiste is left to the jury; and they will judge of it as it has or has not produced belief on their minds. You are to be reasonably satisfied of its truth, before you will found your verdict upon it; and you will make up your opinion on all you have seen and heard in the course of this trial. If, then, you shall believe that the prisoner took the part attributed to him in the transactions of the 4th March 1829—a day, he said, he should never forget—it cannot be questioned that he is a principal in the crime, although he did not strike any of the mortal blows; he was present, aiding and abetting the actual murderers; and you may presume, from the manner in which he rendered his assistance, and his whole deportment at the time of the murder and subsequent to it, that he was a party to the whole conspiracy and design. If, indeed, he acted under terrifying menaces, and a real and well grounded fear of his life had he refused, he will stand excused, but his peril should be violent and clearly proved.

The matter of fact being left entirely to you upon the whole evidence, some important and highly interesting questions of law have been argued in this case, on which it was the duty of the court to give an explicit opinion.

It is alleged on the part of the defendant, that there is no proof that he is a citizen of the United States, and that it is in full proof that the brig on board of which the crimes charged in the indictment were committed, was a foreign vessel; that she was wholly owned by French subjects, and was at the time sailing under the French flag. It is then said, that the case presented to you is one in which a foreigner has committed an offence on board of a foreign vessel, and that such a case is not cognizable by the courts of the United States—and so is the law. This argument or inference is founded on the assumption of two facts, which must be settled by you before you receive the conclusion: First, is Henry Kessler a citizen of the United States? This you will decide by the evidence. It appears to me to be hardly susceptible of a doubt. You have had an account of his father residing in New Jersey, since he (the father) was seven years old; of his grandfather living there; of his father and grandmother still living there; of an aunt residing in this city; and no intimation that they had ever been out of this country. Not one of these persons has he produced upon the subject of his birth and citi-

[United States v. Kessler.]

zenship. Such circumstances at least throw the burthen of proof upon him, or leave him to the conclusion every one will draw from them. The next question of fact is, was the brig L'Eclair a foreign vessel, belonging exclusively to French owners and sailing under the French flag? You will remember the evidence on this point; it was clear and uncontradicted in proving that she was altogether owned by French subjects, and sailed under the flag of France; and indeed this fact is conceded by the district attorney. If such shall be your understanding of these two facts, then the case is not that of a foreign subject committing an offence on board of a foreign vessel, but of a citizen of the United States committing an offence on board of a foreign ship. The question of law here presents itself—is this an offence under the acts of congress of the United States, and has this court jurisdiction to try and punish the offence? Happily it is not a new question, but has more than once passed under the solemn consideration of the supreme judicial tribunal of our country. The difficulties and doubts, therefore, in which it may once have been involved, are removed by an authority of the highest respectability in itself, and which this, as a subordinate court, is bound to obey.

The first, and as it has been truly called, the leading adjudication on the interesting question now before us, was made in *Palmer's Case*, reported in 3 Wheat. 610. This case came to the supreme court, certified from the circuit court of Massachusetts, where certain questions occurred upon which the opinions of the judges of the circuit court were opposed. Eleven questions were in this manner brought up to the supreme court, where they were argued with much care, and solemnly decided. The third and fourth questions only are material to our purpose. The third is, whether the crime of robbery committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel, belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy within the true intent and meaning of the eighth section of the act of congress of the 30th April 1790, and of which the circuit court of the United States hath cognizance to hear, try, determine and punish the same. It will be perceived that this question embraces that before this court, on the supposition that the defendant is not a citizen of the United States.

The next question equally embraces it, on the supposition that he

[United States v. Kessler.]

is a citizen of the United States. It is as follows : whether the crime of robbery committed on the high seas by citizens of the United States on board of any ship or vessel not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of a foreign state or sovereignty ; or committed on the high seas, on the person of any subject of any foreign state or sovereignty, who is not at the time on board of any ship or vessel belonging in whole or part to the United States, or to any citizen thereof, be robbery or piracy within the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognizance to hear, try, determine and punish the same.

Nothing can be more distinct and unequivocal than the terms in which these questions are propounded, and they so clearly describe the case of the defendant, be he a citizen or an alien, that the answer given to them by the court must decide his case, so far as it depends upon the acts of congress referred to. The opinion of the courts on these questions was delivered by the chief justice in his accustomed luminous and exact manner. He says : “ the question whether this act extends further than to American citizens, or to persons on board American vessels, or to offences committed against the citizens of the United States, is not without its difficulties.” He then remarks upon the universality of the words of the section, which are of unlimited extent—“ *Any person or persons* are broad enough to comprehend every human being.” The chief justice then goes into a clear, rational and satisfactory argument to show from various parts, of the act the inconveniences and the absurdities that would follow the adoption of the full and literal meaning of the words used ; that some limitation must be put to them, and was intended by the legislature. He concludes : “ the court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.” The certificate of the court conforms to this opinion ; and was transmitted to the circuit court of Massachusetts as the settled law of our country. This judgment was rendered on the 14th of March 1818. In the April following, an indictment came on to be tried in this district, in which it became necessary for Judge Washington to refer to the law of Palmer’s Case, and declare

[United States v. Kessler.]

what had been settled by it. He says, the question arose whether robbery on the high seas committed on board a foreign vessel amounted to piracy, within the true intent and meaning of the eighth section, and was cognizable by the courts of the United States. He repeats that the general and unqualified expressions of the section would cover such a case, but says, "upon the whole it was decided that a robbery committed by any person on the high seas, on board of a ship belonging exclusively to a foreign state, or to the subjects thereof, or upon the person of a foreign state, in a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the eighth section of that law." He adds: "although the offence of robbery is the only one stated in this decision, yet there can be no doubt but that all the other acts of piracy enumerated in the section are included in the same principle." In another part of this opinion the learned judge says of Palmer's Case, "that case decides that the act of piracy must be committed on board of an American vessel." United States v. Howard et al., 3 Wash. C. C. Rep. 334.

Two years afterwards this question came again under the notice of the supreme court, in the case of the United States v. Klintock, 5 Wheat. 144. The indictment charged the defendant, a citizen of the United States, with piracy committed on the high seas, in a vessel belonging to persons unknown. The facts were, that the defendant was a citizen of the United States, and the vessel was owned without the United States. The defendant was found guilty generally: his counsel moved in arrest of judgment on various grounds, one of which was, that the act of 30th of April 1790 does not extend to an American citizen entering on board of a foreign vessel; committing piracy upon a vessel exclusively owned by foreigners. The opinion given in Palmer's Case was here reviewed, and if any mistake or misconception had occurred in it, it would now have been corrected. The opinion of the court is again delivered by the chief justice, and he intends to explain, more clearly, if possible, the meaning of the court in Palmer's Case. He says the opinion and certificate given in that case, apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign government. To amplify the import of these words, the court say, that to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time in point of fact, as well as right, the property of the subjects of a foreign state, who must have at the

[United States v. Kessler.]

time, in virtue of this property, the control of the vessel : she must at the time be sailing under the flag of a foreign state, whose authority is acknowledged. "This," says the chief justice, "is the case which was decided; we are satisfied that it was properly decided."

At the same session of the supreme court the case of the United States v. Holmes and others was decided, and the opinion of the court delivered by Judge Washington. Various questions are here submitted for the judgment of the court. The case of Klintock is referred to as the settled law, and the judge says; "it makes no difference whether the offender be a citizen or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel belonging to the United States by a foreigner, the offender is to be considered *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails." That is, the national character of the offender is nothing; the jurisdiction is decided by the character of the vessel.

But an act of congress was passed on the third of March 1819, which appears to me to have an important bearing on this question. It will be recollected that the decision of Palmer's Case took place in March 1818. After which, and the decision in Howard's Case, which occurred in the April following, and in these points is substantially the same with Palmer's, the courts of the United States had cognizance of piracies, only, 1. When committed on board of American vessels; 2. When committed by persons on board of a vessel not belonging to any foreign power, but in the possession of men acknowledging obedience to no government or flag whatsoever; but our courts had not cognizance of piracies as "defined by the law of nations," which is robbery committed on the high seas; forcibly and feloniously seizing, taking and stealing a vessel from her master, with the goods on board; and other acts of the same description, without any regard to the national character of the vessel. To supply this defect in the law of 1790, or rather to try whether it was a defect or not, the fifth section of the act of March 1819 was enacted.

When congress passed this act, it must be presumed, and was doubtless the fact, they had the opinion of the supreme court in their view, by which the offence of piracy had been restricted as we have seen. By the fifth section of this act of March 1819, it is enacted, "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the laws of nations*, and such

[United States v. Kessler.]

offender or offenders shall, afterwards be brought into, or found within the United States, such offender or offenders shall, upon conviction thereof, before the circuit court of the United States, for the district into which he or they may be brought, or in which he or they shall be found, be punished with death !”

Here then was an act enlarging the jurisdiction of the courts of the United States in the punishment of piracies greatly beyond the limits assigned to it by the supreme court, in their construction of the act of April 1790 ; and if the fifth section of the act of 1819 were now in force, it cannot be doubted it would cover the offence charged upon the present defendant, for assuredly the crimes committed on board the brig L'Eclair, amounted to piracy under the laws of nations. Congress, however, had felt the force of the reasoning of the court in Palmer's Case ; and may have doubted the policy or propriety of extending their penal law beyond their own vessels, leaving it to other nations to do the same with theirs ; and therefore declared, that this act should be in force only until the end of the next session of congress ; and what did they do after making this experiment for one year ? they continued, by the act of 15th May 1820, all the sections of the act of 1819 for another term, except this fifth section which was suffered to expire ; and the third section of the act of May 1820 was enacted, under which some of the counts of this indictment have been drawn and presented. In this third section it will be found that congress have gone back, in their description of piracy, to the use of the general expressions, “*if any person*” shall commit the crime of robbery in or upon “*any ship or vessel*,” employed in the eighth section of the law of April 1790 ; well knowing the limited construction the court had put on these words, not only in Palmer's Case, but in Klintock's and Holmes's, both of which were decided before the law of May 1820, and during the session of congress at which it was passed ; and they abandoned the attempt to give their courts jurisdiction of piracies “as defined by the laws of nations.” Further to this point ; in March 1825, congress again legislated on the subject of offences committed on board of vessels, without an attempt to correct the error, if it were one, of the supreme court, or to extend the jurisdiction of the court in such cases beyond the limits assigned to them by the supreme court. Indeed they rather recognise the principle, that the character of the vessel, and not of the offender, shall decide the question of jurisdiction.

In the fifth section it is enacted, “that if any offence shall be committed on board of any ship or vessel belonging to any citizen or citi-

[United States v. Kessler.]

zens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of the said ship," the offence shall be cognisable and punishable by the circuit court of the United States. We see here that neither the national character of the offender, nor the territorial jurisdiction of the place where the offence is committed, is regarded, but solely the national character of the vessel to which the offender belongs, and on board of which the offence is committed. It is also worthy of notice that two of the sections of this act, the fourth and fifth, are introduced to meet two defects in the existing law which had been detected by judicial examination.

If then the supreme court, by the principle they have adopted, have subjected us to danger and opprobrium, by making our country a refuge for abandoned criminals, it cannot be denied that the congress of the United States must participate in this reproach, for not correcting the law, when they have the power to do it; or rather for giving those principles an acquiescence, if not a direct approval.

It has been argued by the district attorney, that if the law of 1820 is the same with that of 1790, why enact it at all? Why not leave the subject to the provisions already in full force? It is an obvious defect in this argument that it takes broader premises than belong to our question. These laws may be the same in the particulars material to the point we are to decide, that is, the true signification of certain forms of expression, but may differ in other matters. We now only speak of the eighth section of the first act, and the third section of the last, which relate to piracy, for in other respects the laws embrace wholly different subjects of criminal legislation. These two sections do not differ in the phrases on which the construction of the supreme court was passed; and it would introduce a strange and intolerable confusion and incongruity in the administration of justice, if the same words were admitted to have one meaning in the first act, and another in the second, both legislating on the same subject. If a man indicted for piracy under the law of 1790, could not be convicted if the offence were committed on board of a foreign vessel, he might be convicted and capitally punished for the same act, committed in the same circumstances, if indicted under the law of 1820. Nay, what would be done when, as in the present case, some of the counts are founded on one of these acts, and some on the other? It may be remarked, that in the last act the reference to offences punished with death, if committed in the body of a coun-

[United States v. Kessler.]

try is omitted ; and other differences will be found between the two sections. What effect these differences will have upon the law of 1790, on the points in which they occur, we need not now inquire.

On this question of construction of the general words in the law of 1790, it is not amiss to remark, that it is distinctly admitted that if in this case all was foreign, the offender as well as the flag, the prosecution would fall. But the words of the act, in their full and literal meaning, as a common reader would understand them, would certainly embrace such a case ; so that the only difference between the supreme court and the district attorney is, that they draw their limits rather closer than he is now willing to do. They differ in the measure, not in the principle ; both find it necessary to narrow the broad import of the terms of the act, but they would do so in different degrees and by a different scale.

To pursue the intention and meaning of the third section of the law of 1820 a little closer, let us bring its operative descriptive words, and those used in the eighth section of the act of 1790 together, and on a comparison see whether we can be allowed to say that by one of them it was intended to describe an offence committed only on board of an American vessel, and by the other to describe an offence committed on board of any vessel, American or foreign. By the act of 1790, *if any person commit upon the high seas, &c. murder or robbery, or if any captain or mariner of any ship or vessel shall piratically run away with such vessel, or any goods, &c., every such offender shall be deemed and adjudged a pirate.* By the act of 1820, *if any person shall upon the high seas commit the crime of robbery in or upon any ship or vessel, or the lading thereof, such person shall be adjudged a pirate.* The description in the first act is rather more general than in the second, using the words of the definition of piracy by the laws of nations, that is, robbing on the high seas, referring to no vessel of any description. The supreme court had decided that congress had a right to define piracy, as they had done in the law of 1819, by a reference to the laws of nations, that is "*as defined by the laws of nations.*" We cannot therefore presume that they dropped this definition in 1820, from a doubt of its propriety, and that they intended to cover exactly the same ground by the terms "shall commit the crime of robbery on the high seas," especially as the same court had solemnly adjudged that these terms were not so comprehensive. If they had so intended, they would have said so explicitly, knowing that the court had decided that such expressions would not reach a

[United States v. Kessler.]

robbery committed by a citizen or foreigner on board of a foreign vessel, although such would be piracy by the laws of nations, and was included in the definition adopted in the act of 1819. Had it been the intention of the legislature to retain in the act of 1820, as they have done, the words descriptive of the offences which they had used in 1790, but to repudiate the restricted construction put upon them, it would have been easily done by adding to the words "ship or vessel" *whether belonging to an American citizen or not*.

We cannot overlook that the act of 1790 makes the commission of murder or robbery on the high seas, piracy, punishable by that act. The law of 1820 speaks of robbery only, omitting murder. It follows, that if the description of the offence in the latter act is to have the larger construction contended for, while the former remains subject to the restriction imposed upon it, our courts will have cognizance to try and punish a robbery committed by an American citizen on board of a foreign ship, but not a murder. Can any reason be assigned why congress should make this distinction?

We may readily imagine good cause, founded not only on national policy but on strict justice, why congress should finally determine to leave the law as the supreme court had pronounced it; and to decline the trial and punishment of crimes committed in a foreign vessel, that is, within and under a foreign jurisdiction. If we adopt the broad construction of the law of 1820 which its terms import, we must try and punish not only an American citizen, but a foreigner also, for offences committed on sea in a foreign vessel. It is easy to see that this might get us into difficulties with other nations, who may not choose that we should hang their subjects by the mode of trial and sentence of our tribunals, for offences on board their own ships under their authority and protection. They may choose to be themselves the judges of the guilt of the accused, and of the measure of the punishment. On the other hand, how might our proceeding affect our own citizens? Take the case before you: suppose this defendant, after a full and fair trial, should convince this jury of his entire innocence and be by them acquitted. He would, on a fundamental principle of our criminal law, think himself out of jeopardy and absolved from all further responsibility on this account. Under this belief he goes to France, with or without his means of defence; he is there arrested and brought to trial. Would the courts of that country pay any regard to your judgment in relation to a crime committed in one of their vessels on the person

[United States v. Kessler.]

and property of their subjects, and more especially if the offender also was one of their subjects? Questions and difficulties of this sort are avoided by confining our cognizance of offences on the high seas to our own ships, leaving other nations to take care of their own.

On this part of the case it is my opinion that those counts of this indictment which are founded on the act of the 30th of April 1790, fall directly under the decisions of the supreme court giving a construction to that act; and therefore, if you shall believe, as is indeed conceded by the district attorney, that the offences charged in these counts were committed on board of a vessel belonging exclusively to subjects of a foreign state, sailing under the flag of a foreign state, whose authority is acknowledged, it is not piracy within the true intent and meaning of that act, and this court hath no cognizance to hear, try, determine and punish the same. As to the counts which are founded on the act of May 1820, it is my opinion that the general descriptive terms of the offence used in this act, must be taken and understood with the same limitations given by the supreme court to the same or similar expressions in the act of April 1790; and therefore, that if the offences charged in these counts were committed on board of a vessel belonging exclusively to subjects of a foreign state, whose authority is acknowledged, it is not piracy within the true intent and meaning of the act of May 1820, and this court hath no cognizance to hear, try, determine and punish the same.

The district attorney has made another effort to get this case within the jurisdiction of the courts of the United States; and we must agree that any effort to bring such atrocities to punishment is commendable. The second count of the indictment lays the piratical and felonious stealing of the goods, moneys, &c. from and out of the brig *L'Eclair*, to have been done within a marine league of the coast of the United States; and the fourth charges that the defendant, with other persons, within a marine league of the coast of the United States, piratically did run away with the said brig, and with certain goods, moneys and effects, &c. The first step to warrant a conviction on these counts is to establish the facts asserted in them, that is, that the offences charged were actually committed within a marine league of the coast of the United States; and this it is incumbent upon the prosecution to show. The point of time taken by the district attorney is that when the brig was scuttled and abandoned by the crew, taking with them their plunder. Was she

[United States v. Kessler.]

at that period within a marine league of our coast? The only witness who testifies upon this subject is John Battiste, who said, on his first examination that it was about three miles from the shore, or it might be more. He afterwards said it was about three miles, which may mean more or less; and finally declared he knew nothing about it from his own observation or knowledge, but spoke only from having heard John Mansfield say, they were about three miles from the shore. What light is given to this part of the case, by the accounts, detailed in a very confused way to my mind, of the direction in which the brig sailed, off and on along the coast for several hours before she was left, you may be able to discover. It appears to me to be altogether imperfect and unsatisfactory. But admitting that the brig was within the marine league of our coast, when she was scuttled, does that maintain the charge, to wit, that the moneys and effects were piratically stolen; or that the moneys and effects were piratically run away with. It does not appear so to the court. The goods were stolen when they were taken into the possession of the robbers, and divided between them on the 4th of March, more than a month before they came on our coast. The vessel was run away with at the same time, when she was taken out of the possession of her lawful officers, and her course changed from that she was pursuing. All this was fully accomplished long before she approached our coast. The crime was complete, and nothing was done to add to it, after the arrival at the American shore. I cannot agree to the argument of the district attorney, that jurisdiction is given by bringing the stolen property within the territorial limits of the United States. This is the law as between two counties of the same state, but has been held not to prevail in the case of stolen property brought from one of the United States to another.

It is my duty to go on one step further on this subject; you will remark that this point becomes important to the prosecution only on account of the foreign ownership of this brig. Had she been American, then the crime being committed on the high seas it would have been immaterial whether it was within or without the marine league of the coast, either of this or any other country; but it is argued, that although we may not have jurisdiction of an offence committed on the high seas on board of a foreign vessel at a greater distance than three miles from the shore, yet if it be within that distance we obtain a right to try and punish it. I am not of this opinion. The jurisdiction of this court is derived wholly from the acts of

[United States v. Kessler.]

congress on this subject. The description of the place to which or over which it extends is the *high seas*. If then the space within the marine league is not comprehended within this description, this court has no jurisdiction over it; if it be comprehended, as it certainly is, then it is so because it is a part of the high seas, in all respects, and to all purposes the same as any other part of the high seas. Nothing is added to the jurisdiction of the courts of the United States by reason of the offence having been committed within this distance of their coast; nothing is taken from it by reason of its having been committed within the jurisdictional limits of a foreign government, within a marine league of the shore, if done on the high seas, which are held to be any waters on the sea coast, without the boundaries of low water mark. It follows from these principles that if this court has no power under the act of congress to try and punish this offence committed on board of a foreign vessel on the ocean, it acquires no such power because she was within a marine league of our coast when the offence was committed. The principle on which nations claim this extension of their authority and jurisdictional rights for a certain distance beyond their shores, is to protect their safety, peace and honour from invasion, disturbance and insult. They will not have their strand made a theatre of violence and bloodshed by contending belligerents. Some distance must be assumed. It varies by different jurists from one league to thirty; and again, as far as a cannon will carry a ball. Such limits may be well enough for their object, but would be extraordinary boundaries of the judicial power and jurisdiction of a court of law.

It is my opinion that whether this offence was committed within or without a marine league from the coast of the United States is of no importance to the question of the jurisdiction of this court to hear and determine it.

The case, gentlemen, is now left with you to be decided according to your judgment and conscience on the fact and the law. I have given you distinctly, I hope, my opinion of the law of the case, and such observations upon the most prominent facts as I have supposed may be of some service to you in your deliberations on them.

On Saturday morning the jury returned a verdict of, acquitted "for want of jurisdiction."

**WILLIAM REED, A CITIZEN OF PENNSYLVANIA V. MARIA G. ROSS,
A CITIZEN OF THE STATE OF DELAWARE, ADMINISTRATRIX, ETC.
OF DAVID ROSS, ET AL.**

"*Nil debet*" is not a good plea to an action brought in this court to a judgment obtained in the circuit court of the United States for the district of Delaware.

J. M. READ, for the plaintiff.

This is an action brought on a judgment obtained by the plaintiff against the defendant in June 1827, in the circuit court of the United States for the district of Delaware.

The defendant pleads "*nil debet*," to which plea the plaintiff demurs, and the defendant joins in the demurrer. The question is, whether *nil debet* is a good plea to an action of debt upon the judgment rendered as above.

An action of debt lies on a judgment within or after a year subsequent to the recovery. 1 Ch. Pl. 103, edit. of 1809.

Action of debt lies on records, or on judgments, &c. Where the record is the ground of the action, and not merely inducement, *nil debet* is no plea. 2 Lord Raym. 1501, 1502, 1503; 1 Saund. 218, note 4; *Whitty v. Lane*, 1 Chitty 480.

There can be no averment of record or its validity. This is the case of a judgment in the circuit court of the United States, and an action of debt on it in another. Constitution of the United States, art. 4, sect. 1; Acts of Congress of 26th May 1790, and 27th March 1804.

The courts of the United States regard a judgment in another circuit as one county in Pennsylvania would regard a judgment in another. *Armstrong v. Carson's Executors*, 2 Dall. 302; *Green v. Sarmiento*, 1 Peters's C. C. Rep. 78; *Field v. Gibbs*, 1 Peters's C. C. Rep. 155; *Mills v. Duryee*, 7 Cranch 486; *Johnson v. Dessont*, 7 Cranch 486; *Hampton v. M'Connell*, 3 Wheat. 234; *Mountford v. Hunt*, 3 Wash. C. C. Rep. 28; *Bryant v. Hunt*, 3 Wash. C. C. Rep. 54; *Biddle v. Wilkins*, 1 Peters's S. C. Rep. 686, 692; *Mayhew v. Thatcher*, 6 Wheat. 129.

On a general demurrer *nil debet* is a bad plea, however it might be if issue had been taken upon it.

[Reed v. Ross et al.]

Judgments in sister states not to be taken as foreign judgments. *Benton v. Burgot*, 10 Serg. & Rawle 240; *Evans v. Tatem*, 9 Serg. & Rawle 252, 259. In New York they have come to the same conclusion. In Massachusetts, unsettled. Act of 3d March 1797, sect. 6, 1 Story's Laws 465.

This is the case of an action of debt simply and directly on the judgment, not the case of a devastavit, or where the judgment is mere inducement.

The cases cited were of judgments against the party in his lifetime, but the principle is the same if against an executor or administrator. The judgment should have the same effect here as in the district where it was rendered. This principle does not apply to liens on lands, or distribution of effects. 1 Saund. 336; Tidd's Prac. tit. Form of a Judgment against an Executor, 186.

This judgment is conclusive as to assets. *The People v. The Judges of Erie*, 4 Cow. 445, 447; *Swearingen v. Pendleton*, 4 Serg. & Rawle 389; 1 Roll. Ab. 603, pl. 2; 2 Danvers 503; 1 Litt. 404; 2 Hayes's Rep. 301; 9 Serg. & Rawle 259.

Mr Ingraham, for the defendant.

No case has been cited where the judgment was against an executor or administrator. The act of congress relates to judgments in the state courts, not to the court of the United States. *Mumford v. Hunt*, 3 Wash. C. C. Rep. 28. The party there took his chance. In *Mayhew v. Thatcher*, 6 Wheat. 129, the only question was, whether it was necessary to execute a writ of inquiry. *Carpenter v. Thornton*, 3 Barn. & Ald. 52.

If this suit had been brought in the circuit court of Delaware, would this plea have been good? Toll. on Executors 455, Ingraham's edit.; 2 Lord Raym. 1502; *Burnet v. Andrews*, 1 Saund. 219; 2 Tidd's Prac. 1113, 8th edit.; 2 Rand. 308. No objection made to the plea.

Mr Read replies, in conclusion.

Judgment on the demurrer for the plaintiff.

OGDEN, FERGUSON AND COMPANY V. GILLINGHAM, MITCHELL AND COMPANY.

O. W., residing in New York as the agent of T. N., who had gone to England, put into the hands of the defendants in Philadelphia a quantity of tin to be sold. On the 13th of March the defendants, by letter, informed O. W. that they had sold three hundred boxes, net amount 2569 dollars 72 cents, "for which you can value on us, payable on the 19th instant." On the 15th of the same month O. W. drew the bill in question. It appeared that before the bill was drawn, T. N. had become bankrupt in England. The defendant gave in evidence certain attachments laid on the property of T. N. in his hands. Held, that the above letter did amount to an acceptance of the bill drawn in conformity with it. That the bankruptcy of T. N. did not revoke the power of his agent to draw the bill without notice.

THIS action is brought to recover the sum of 2569 dollars 72 cents, the amount of a bill drawn by Thomas Newbold & Co., of New York, on the defendants, in favour of the plaintiffs, and duly accepted by the defendants. The pleas are non assumpsit and payment, with leave to give the special matter in evidence, especially certain writs of foreign attachment.

After the closing of the evidence on both sides, it was agreed to take a verdict for the plaintiff, subject to the opinion of the court on the following points.

1. Whether there was an acceptance of the bill.
2. Whether the bankruptcy of Thomas Newbold took away the authority of his agent to draw the bill.

The bill was drawn by one Oliver D. Ward, residing in New York, the attorney of Thomas Newbold, who had left the United States. Ward, acting as the attorney of Newbold, had put into the hands of the defendants a quantity of tin, with directions to sell it. The defendants afterwards wrote to T. Newbold & Co. at New York, that they had sold three hundred boxes of the tin, net amount 2569 dollars 72 cents, "for which you can value on us, payable on the 19th instant." This letter was dated 13th March 1828. On the 15th Ward drew the bill in question, payable on the 19th to the plaintiffs, in conformity with the letter of the defendants. The defendants gave in evidence certain attachments issued from the district court of the county of Philadelphia. Other facts were given in evidence,

[Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.]

which will appear in the arguments of the counsel and opinion of the court.

Mr Binney, for the plaintiff.

The points reserved are :

1. Whether the letter of the 13th of March 1828, amounted to an acceptance of the bill.

2. Whether the bankruptcy of Thomas Newbold took away the authority of his agent to draw the bill.

1. The letter states that the bill may be drawn payable on the 19th of March ; the sum is precisely mentioned, and the bill conforms to the letter in both particulars. The bill was taken by the plaintiff, as so much cash, for the discharge of a debt actually due to them. *Coolidge v. Payson*, 2 Wheat. 66, decides the case in every particular. *Johnson v. Collings*, 1 East 91, is relied upon by the defendants ; but in that case the promise to accept was not shown to the person taking the bill, but was a mere promise from a debtor to his creditor. Lord Kenyon goes the whole length of saying, that a promise to accept a non existing bill is not binding ; but see *Le Blanc's* opinion, which limits it and makes it binding under circumstances ; and see remarks on that case in 2 Wheat. 73. The true principle is the credit given to the promise, this cannot be weaker if the party making the promise has funds.

Was there an express promise ? The words are, "for which you can value on us." Nothing is said expressly about accepting or honouring the bill ; none of the cases contain an express promise in terms to accept : *Pierson v. Dunlop*, Cowp. 572 ; that was a negative acceptance, that is, it will not be accepted till the navy bill was paid ; "you can value," that is, we authorize you to do it, to draw a good and valuable bill. See *Chitt. on Bills* 215, 227, as to what is an acceptance.

2. Was the attorney authorized to draw the bill at the time he drew it, that is, did the bankruptcy of Thomas Newbold revoke the authority ?

Ward acted as the attorney of Newbold to the 17th of March 1828. He dealt with the plaintiff in that character ; made them advances in that character ; he had said or reported in New York, that Newbold (then in England) was bankrupt, but he had no official knowledge of it until the 17th of March.

Does a bankruptcy in England revoke a power of attorney in the

[*Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.*]

United States, so far as relates to property in the United States, paying debts, &c. without notice? It does not, that is, so as to prevent the attorney from paying debts. The revocation by bankruptcy is by the operation of law, not by the act of the principal. The English bankrupt law has no extra-territorial power, it operates no transfer of property in the United States, to the prejudice of American creditors. Creditors have attached property here after bankruptcy there. *Harrison v. Sterry*, 5 Cranch 302; *Milne v. Morton*, 6 Binn. 353, 360. Can a foreign attaching creditor take the property, notwithstanding the bankruptcy, and yet a creditor here cannot receive it from the attorney with whom he dealt, to whom he made his advances on the credit of the funds in his hands, and that they would be at his disposal? If the power of attorney is revoked by the bankruptcy in England, it must be by transferring the property in the hands of the attorney to the assignees under the commission; the transfer then should also reach the attachments, which can hold the property only as the bankrupt's at the time of the attachment. The objection must be, not that the assignment in England directly affected or revoked the power, but that the property in question no longer belonged to the principal or to his attorney; that he has no power over it, because it was transferred to the assignees. Did it transfer the property? Could not the bankrupt himself have paid debts with this money? Bankruptcy, assignment, &c. are all nothing, as to the acts of the attorney, without notice. *Wickersham v. Nicholson*, 14 Serg. & Rawle 118. This case proceeded on a misapprehension of the English law, as it appears in *Vernon*, which was overruled in *Sowerby v. Brooks*, 4 Barn. & Ald. 528. Issuing a commission is not of itself notice of an act of bankruptcy. There is but one instance of constructive notice in the English bankrupt law, that is, a publication in the gazette, with ground to believe that the party had read it; as to death, partnership and revocation by the principal, notice is necessary. *Gow on Partnership* 53, 54; *Pal. on Agency* 142, 157; 5 D. & E. 215; *Salt v. Field*, 12 Mod. 346; ——— *v. Harrison*, 2 Ves. Jun. 118; *Eden on Bankruptcy* 261.

What was the notice in this case? The new attorney of the assignees presented himself and his power to the agent here, on the 17th of March. This, the only notice, except a rumour he had heard before. No party bound to respect it, would the agent have been justified if by relying on it, his principal had lost a debt? It was uncertain in its terms. To say that a man is bankrupt does not

[*Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.*]

necessarily mean that it is a bankruptcy, in due course, so as to affect the authority of an agent, or the property in his hands. The statute does not make this notice, it must be knowledge. 16 Vin. 10, pl. 2; 14 Serg. & Rawle 143. If the principal had sent a revocation to his agent, which was concealed from persons dealing with him as the agent, it would not affect them. A foreign bankruptcy cannot have more effect than an absolute revocation of the power. *Morgan v. Stell*, 5 Binn. 315.

Mr Broom, for defendant.

The case in 2 Wheaton puts at rest many of the doubts on this subject in England. There must be a promise to accept. When I say, you may draw on me for a certain amount, it is an undertaking to accept and pay it? but is such a promise negotiable? can it be transferred to another? Can the person who takes such a draft sue in his own name? Did the letter intend that Newbold should draw in favour of any body, or only that there was that balance to be paid to him if he called for it?

2. As to the effect of the bankruptcy. We do not contend that a bankruptcy in England operates as a legal transfer of property here, but the assignees may sue in the name of the bankrupt for their own use. 6 Binn. 361. See argument of Mr Binney in that case.

Can the power of attorney subsist after all the authority of the principal is gone? He could not have made a contract in relation to this property. How could his attorney? It follows that provided there was notice, the transfer would be void as between the principal and agent. The whole power of the agent over this property was gone by the bankruptcy, the only question, as to third persons not having notice. *Houston v. Robinson*, 6 Taunt. 449; 16 East 386; 5 Esp. Rep. 158. How far will the want of notice protect third persons? We do not contend that general rumour is notice. This rumour was sufficient to put the attorney on the inquiry. Why protect the plaintiffs more than any other creditors of Newbold? If the draft is destroyed they will stand as they did before it was drawn; they are not injured, or their position changed.

Mr Binney, in reply.

The law, as established by the supreme court, is, that if an engagement authorizes another to draw, it is negotiable. 16 Vin. 5, pl. 12. The letter is not a promise to pay, but an authority to draw

[Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.]

a bill—to make a negotiable instrument. When the question is between the bankrupt and his foreign assignees, the court will assist the latter. The case is different when it is between the foreign assignees and creditors here. The English system of bankruptcy has no effect here by its own force; it is by courtesy, in a case between the bankrupt and his assignees. The injury to the party is not the question, but whether these acts are revocations to persons not having notice of them. 2 Wheat. 73.

Mr Broom, cites 4 Camp. 272, as to revocation of power.

December 7, 1829. Judge HOPKINSON delivered the following opinion, upon which a judgment on the verdict was entered for the plaintiffs.

On the 6th of July 1826, Thomas Newbold, then of the city of New York, but about to depart for England, appointed Oliver D. Ward and George H. Newbold, jointly and severally his attorneys, for him and in his name, or in the name of Thomas Newbold & Co.; authorizing them or either of them, among other things, “to draw such bill or bills of exchange, check or checks, note or notes, and accept, indorse and pay the same, and execute and deliver such instrument or instruments in writing, as they shall consider necessary in the due course and management of his business.” Shortly after the execution of this power, Thomas Newbold left the United States, and Oliver D. Ward took upon himself the powers given him by that instrument. He transacted all the business of Newbold in this country, opened and answered his letters, drew drafts and bills in his name and in his behalf, and generally did his business. In the exercise of this trust and authority, Mr Ward had put into the hands of the defendants, then residing in Philadelphia, a certain quantity of tin, on Newbold’s account, and instructed them to sell it.

On the 13th of March 1828 the defendants addressed a letter to Thomas Newbold & Co., New York, in which they write:

“Gentlemen, Herewith you have sales of three hundred boxes tin, which we hope will be satisfactory, net amount 2569 dollars 72 cents, which you can value on us for, payable on the 19th instant, say twenty-five hundred and sixty-nine dollars and seventy-two cents.

“Yours, very respectfully,

“GILLINGHAM, MITCHELL & Co.”

This letter, of course, was received by the agent, Oliver D. Ward,

[Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.]

and opened by him. He was known by the defendants to have this authority, as several letters had passed between them on the subject of this tin.

At the time Mr Ward received the above letter, Thomas Newbold was indebted to the plaintiffs, Ogden, Ferguson & Co., and continued so after this suit was brought. Mr Ward had some money in his hands to pay them on account of their advances to Newbold. After receiving the letter he went to them, *showed them the defendants' letter*, and offered to give them a draft on the defendants for the amount stated in the letter, which *they agreed to receive as cash*. There was more than this amount due them by Thomas Newbold.

On the 15th of the same March, that is, two days after the date of the defendants' letter, Ward drew a draft on the defendants, for the recovery of which the present action was brought. The draft is as follows:

“\$2569 72.

New York, March 15, 1828.

“On the 19th instant, without grace, please to pay to the order of Messrs Ogden, Ferguson & Co., twenty-five hundred and sixty-nine dollars and seventy-two cents, value received, and charge the same to your obedient servants.

“THOMAS NEWBOLD & Co.

“Per O. D. WARD.

“To Messrs Gillingham, Mitchell & Co., Philadelphia.”

It will be observed that this bill is drawn precisely in conformity with the letter of the defendants in every essential particular. It is for the same amount; it is payable on the 19th instant, without the usual grace; it is unquestionable that the letter describes the bill which may be drawn, and the bill actually drawn is according to that description. At the time of these transactions in Philadelphia and New York, as it afterwards appeared, Thomas Newbold had become a bankrupt in England. There was a report of this in New York before the draft was drawn; but Mr Ward, the agent, was not officially informed of it until the 17th of March, when the attorney under the assignees superseded Mr Ward in his agency.

When this bill was presented to the defendants, which was on the 17th of March, they replied that it could not be paid for want of authority, and it was accordingly protested.

This action is brought against the defendants on their acceptance

[*Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.*]

of the bill, according to the usage and custom of merchants, and the question is, are the plaintiffs entitled to recover in this action.

The prominent facts of the case are :

1. A clear authority given by the defendants to draw the bill upon them, which is sufficiently described, and was afterwards drawn in conformity with the authority and description ; and a promise or undertaking, that if such a bill were drawn, it would be accepted. It is true they do not say in the terms, if you draw such a bill, we will accept it ; but they use a mercantile phrase, perfectly well and universally understood to mean the same thing, that is, “ which you can value on us for,” or which you can draw on us for ; and to say that Newbold may draw, is to promise that they will accept ; otherwise a paltry equivocation would be allowed to defeat a clear engagement, and to destroy all commercial faith and confidence.

2. When the defendants gave this authority to draw, and this promise to accept, they had in their hands, and still have, funds of the drawer, more than sufficient to answer the bill.

3. The bill was drawn after the promise was made, and promptly after it was received. There was no unreasonable delay in drawing, which by any possibility could have prejudiced the defendants.

4. The bill was drawn in consequence of the promise contained in the letter of the 13th of March 1828. That letter was shown to the payees of the bill, as the authority of the drawer ; and the bill was taken by the plaintiffs as so much cash, on the faith and credit of that letter.

5. The bill was taken for an antecedent debt, and not for money advanced particularly upon it.

On these facts, a verdict was taken for the plaintiffs, for 2822 dollars 82 cents, subject to the opinion of the court, on the following points :

1. Whether there was an acceptance of the bill.

2. Whether the bankruptcy of Thomas Newbold took away the authority of his agent to draw the bill.

On the first point, it is not necessary to consult the English cases for information or authority (although I think them very clear), when the law of the subject has been examined and settled by the supreme court of our country.

In the case of *Coolidge v. Payson*, as reported in 2 Wheat. 66, the English decisions are examined by the chief justice, who delivered the opinion of the court, beginning with *Pillam & Rose v. Van*

[Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.]

Mierop and Hopkins, 3 Burr. 1663; and it is considered by the chief justice that there is no essential difference between that case and the one before the supreme court.

The chief justice distinctly states the question in Coolidge v. Payson to be, "does a promise to accept a bill, amount to an acceptance, to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favour of a person who takes it for a pre-existing debt." I am at a loss to conceive how the question in the case before this court, can be stated in more precise and comprehensive terms, in all its essential points. On my construction of the letter, the promise to accept was made, the bill was taken on the credit of the promise; the promise was made before the existence of the bill, and it was drawn in favour of a person who took it for a pre-existing debt. The answer, therefore, which the supreme court gave to this question, in the case of Coolidge v. Payson, must be the answer of this court in this case. That answer is thus given: "it is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, that a letter written within a reasonable time *before* or *after* the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." The judgment of the court below was affirmed.

On the first point, therefore, I am of opinion that there was a full and binding acceptance by the defendants, of the bill on which this suit is brought.

2. Did the bankruptcy of Thomas Newbold take away the authority of his agent, O. Ward, to draw this bill; for if he had no authority to draw the bill, it cannot affect the funds of Thomas Newbold, on which it was drawn; and the letter of the defendants gave a right only to Thomas Newbold & Co., or one possessing their authority, to draw. The power of attorney given in July 1826, by Newbold to Ward, was full and explicit for this purpose, and unless afterwards revoked or annulled, it continued when this bill was drawn. The agency of Ward was well known to the plaintiffs; they had dealt with him in that capacity.

The bankruptcy of Thomas Newbold, in England, prior to the drawing of this bill in New York, is the only circumstance relied on

[Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.]

to support the position that the powers of Mr Ward, as the agent of Newbold, were determined and annulled at the time he drew the bill for Thomas Newbold & Co.

Was such the legal operation and effect of the bankruptcy under the circumstances of this case? In the first place, had Ward, when he drew the bill, or the plaintiffs, when they took it in payment as cash, notice of the bankruptcy? We have no evidence on this point but from Mr Ward himself, on his cross-examination; nor have the defendants attempted to strengthen what he has said, or to enlarge it, by other testimony in the city of New York or elsewhere. Mr Ward says, "that he had heard it reported in New York that Thomas Newbold was a bankrupt before he gave the aforesaid draft; but was not officially informed of it until Monday the 17th of March 1828, about 11 o'clock, A. M., when Mr Smith, the attorney for the assignees under the commission of bankruptcy, superseded him in his agency aforesaid."

Can Mr Ward be considered to have any notice of the bankruptcy which he was bound to regard, or would have been justified in regarding, until the 17th of March? He did not consider himself to be superseded in his agency till that time. If he had ceased to act on the mere report of the bankruptcy, and it had afterwards turned out to be unfounded, as many reports in a great commercial city daily prove to be, and his principal had suffered in his property or credit by such precipitancy, it would hardly have protected Mr Ward from a responsibility for the damages sustained, if he had merely proved the existence of a vague report, vouched by no body, and without any known name or authority.

Weak, however, as this report was, as a foundation for belief and adoption as a rule of action, it does not appear that it had reached the ears of the plaintiffs, who had acted in entire good faith in taking this bill.

On this view of this part of the case, we must consider the effect of the bankruptcy upon the power of attorney and the acts of the agent, as if those acts were done without any knowledge or notice of the bankruptcy.

If it were desirable or proper to discuss in this place abstract questions, not necessary to the decision of the case in hand, such speculations might be indulged on this occasion. How does the bankruptcy of the principal affect his power of attorney, and the authority of the agent under it? Is it by a direct and immediate operation

[Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.]

upon the instrument or letter of attorney ; or only indirect and consequential, by divesting both the bankrupt principal and his agent of all property on which the power can act ? This question would be tested, by supposing a species of property (and Judge Washington thought there might be such) which does not pass by the assignment of the commissioners. Would the power of the agent over such property be revoked and determined by the bankruptcy ; or, in the present case, was the drawing of the bill an unauthorized and void act ; a nullity not only in relation to the fund on which it was drawn, but to every intent and purpose to which the bill might be applied ? Could the holder prove it as a debt under the commission, or if its date, being subsequent to the bankruptcy, would exclude it, would the bankrupt be liable for it as not being within his certificate and discharge ?

The principal himself has done nothing to revoke the power ; and if it be annulled, it must be so by the legal operation of the assignment to the commissioners ; but that assignment contains no terms to transfer any thing but the property, effects and credits of the bankrupt. If the whole operation of the bankruptcy and the assignment is on the property of the bankrupt, and it can reach the agency only by and through the property ; it is the unquestionable law of this court, derived both from the supreme court of the United States, and the supreme court of this state, that the bankrupt law of a foreign country is incapable of operating as a legal transfer of property in the United States ; that an assignment by *law* has no legal operation out of the territory of the *law maker* ; and, in the case decided in Pennsylvania, an American creditor attaching in the United States, the property of a bankrupt debtor, who had become bankrupt in England, before the attachment was issued and laid, was preferred to the assignees of the commissioners.

On what principle can we say that a debt actually paid in this country by the bankrupt, or, his authorized agent, or which is the same thing, that an appropriation by the agent and the acceptance by the creditor of the bankrupt in the United States, of certain funds of the bankrupt, also in the United States, shall be defeated by the assignment under the commission in England ? Why is such a creditor, to whom it may be said the funds have been paid and delivered, at least against the bankrupt and all claiming by and under him, by the delivery and acceptance of the bill, to be in a worse situation

[*Ogden, Ferguson & Co. v. Gillingham, Mitchell & Co.*]

than a creditor who has laid his attachment on the same property or funds, which is liable to litigation and dispute in various ways?

The cases cited by the defendants' counsel to show the effect of a bankruptcy upon an agency in England; all the parties residing there; all subject to the law there, and all having notice of the bankruptcy, have no application to a case like the present; nor does the *modus operandi* by which the agency is destroyed in England by a bankruptcy, appear in any of these cases. The case here is this; the agent held in his possession a full and unquestioned power of attorney, and had acted under it for two years antecedent to this transaction; he was known and recognised and dealt with as the agent of Thomas Newbold, both by the acceptor of the bill and the person in whose favour it was drawn, and to whom it was delivered as so much cash, in payment of a bona fide debt due to him from the principal. The agent who drew the bill, and the payee, were both resident in the city of New York, where the bill was drawn, and the defendants, on whom it was drawn, resided in the city of Philadelphia, having in their hands the funds belonging to the principal on which the draft was made. At the time the bill was drawn by the agent and delivered to the plaintiffs, neither of them had any notice of the bankruptcy of the principal, which took place in England.

In such a case, I am clear that the bankruptcy has no effect upon the acts of the agent, whatever its general operation on the agency may be. The fund in the hands of the defendants, to the amount of their acceptance, was appropriated to the use of the plaintiffs, and they are entitled to recover that amount in this action.

Let judgment on the verdict be entered for the plaintiffs.

Circuit Court of the United States.

PENNSYLVANIA, OCTOBER TERM 1827.

BEFORE

Hon. JOSEPH HOPKINSON, District Judge.

G. MURATI v. T. LUCIANI.

Difficulty of giving satisfactory proof of handwriting.
Is a comparison of hands evidence in a civil case?

THE declaration in this case stated: 1. That in consideration of 600 dollars, advanced by the plaintiff to the defendant, the defendant undertook to send from Philadelphia, by the ships Florian and Langdon Cheves, to the plaintiff, then residing in Charleston, South Carolina, the value of the said 600 dollars in goods, on or before the 25th of December 1826. Charges that he did not perform this promise. 2. For 600 dollars lent and advanced. 3. On a promissory note, dated 24th December 1826, for 600 dollars, to be paid in April 1827, given in consideration of 200 dollars received by the defendant from the plaintiff in August 1825, and 400 dollars, the plaintiff's part of the profit in a mutual business carried on between them. 4. The same sum lent and advanced, paid, laid out and expended by the plaintiff for the defendant. 5. On an account had and settled between the parties.

Mr Stroud, for the plaintiff.

1.—G

[Murati v. Luciani.]

This suit is brought on two promissory notes; one for the delivery of goods, the other for the payment of money. These notes were given at Charleston on the 26th of November 1826, at which time the plaintiff resided there, and the defendant was there on a visit.

Mr Perkins, for the defendant, denied that the signatures to the notes were genuine; they were not the handwriting of the defendant; said that the plaintiff never had the command of 60 dollars; that he arrived here from Europe in the fall of 1825, and had married the defendant's mother; that he was entirely destitute of money, and could not pay his passage. If the signatures are genuine, we shall show that there is a balance due from the plaintiff to the defendant of 1971 dollars 45 cents.

A great number of witnesses were examined, letters read, and other evidence given on the question of the genuineness of the signatures to the notes, the ability of the plaintiff to be possessed of so much property, &c.

The case was argued to the jury by Stroud and Ingraham, for the plaintiff; and Perkins and Peters, for the defendant.

Judge HOPKINSON charged the jury.

In this case the labouring oar will be with the jury. There is no question of law to be decided; but you must endeavour to come at the truth of the transactions between the parties, from the evidence they have respectively laid before you. You have a considerable mass of incongruous testimony to separate and compare, and contradictory witnesses to reconcile, if you can, or to credit or discredit, as you shall believe or disbelieve them. It is one of the grievances that courts and juries may complain of, that men enter into transactions of business with a most unguarded confidence in each other, or a careless inattention to the forms and proofs which would at all times show the true nature of their dealings; and when afterwards, as it frequently happens, they fall out and criminate each other, they come to you to settle their differences and do justice between them, without bringing with them the means by which you can discover with any satisfactory certainty what is the real truth of their case. They assert and deny, they criminate and recriminate, with equal confidence and equal deficiency of proof, and ask from you a just decision, without affording the means of arriving at it. In this situ-

[Murati v. Luciani.]

ation you must do the best you can between the parties, and will at least do them the service of putting an end to the controversy, which is, perhaps, the best part of the decision of nine cases in ten.

This action is brought on two promises in writing: the first, dated the 24th of November 1826, for the payment of 600 dollars in money; the other, dated on the 26th of the same month, for the delivery of goods at Charleston of the value of 600 dollars.

The defence consists of two parts: 1. A denial of the genuineness of the signatures to the notes: the defendant says they are not his handwriting; that he never signed or gave to the plaintiff any such notes. 2. An account against the plaintiff, as a set-off to his demand, which, if proved, will make a balance in favour of the defendant.

The first ground is by far the most important, as it involves questions of the character of the parties of the most serious consequence. On the one side, it is neither more nor less than a charge of forgery; and the other, of a false and fraudulent denial of a true and genuine instrument to escape from the payment of a just debt. You must decide this grave question: Are these signatures, or either of them, in the handwriting of the defendant? Witnesses have been produced on the part of the plaintiff to prove the truth of the writing; and on the other hand, the defendant supports his denial also by the testimony of witnesses, and by circumstances which he alleges render it improbable, if not impossible, that he should have given these notes to the defendant, or could be indebted to him. For the plaintiff, Jacob W. Lehr has testified, "that he believes the signature to the note of the 26th November, for the delivery of the goods, is the handwriting of the defendant; that he has frequently seen his writing and copied it." The witness being shown a list of goods to be sent by the defendant to the plaintiff, dated 29th November 1826, says, "it looks like the signature of defendant, but he is not certain of it; he will not say any thing about it:" so of the signature to the note of the 24th of November, it looks like his signature, but would not like to say any thing about it.

You have observed that the plaintiff offered an application made by the defendant to the insolvent court, dated 12th January 1824, having to it three signatures of the defendant; that the jury might compare them with the signatures to the notes. *Farmers Bank v. Whitehill*, 10 Serg. & Rawle.

This evidence was admitted to go to you, other evidence having

[Murati v. Luciani.]

been given in support of it ; but I would not be understood to have expressed any decided opinion upon the question ; it may be more deliberately examined hereafter should it be necessary.

The plaintiff rested his proof of the genuineness of those writings on the testimony of J. W. Lehr, afterwards supported by Mr Cope, and signatures of the defendant to his application to the insolvent court. The defendant has produced to you, in the first place, witnesses to prove the destitute poverty of the plaintiff on his arrival in this country in the fall of 1825 ; that he had no money to pay his passage, for which his goods were retained by the captain of the ship ; with other circumstances indicative of poverty. A witness also proved the handwriting of the plaintiff to a note dated at Charleston, 27th November 1826, payable to the defendant for 300 dollars. The same witness proved a certain memorandum to be in the handwriting of the plaintiff ; that he saw him write it. It was a memorandum or list of goods that the defendant sent to Charleston by the plaintiff. The goods were put in the storehouse of plaintiff in Charleston, until a store was procured to put them in. Other goods were afterwards received from the defendant. The witness left Charleston in November 1826, after the arrival of the defendant there. John Baker, captain of the Langdon Cheves, testified that he took the plaintiff a passenger to Charleston, with goods belonging to the defendant ; that the plaintiff had no property in them ; that plaintiff was supplied at Charleston with goods by the defendant ; that the defendant paid for the freight of the goods, and for the passage of the plaintiff. Several witnesses testified their belief that the signatures to the notes were not in the handwriting of the defendant. All of which evidence is now before you, and from it you are to say whether these notes are true or false. Your task is a difficult one. The skill in imitating the writing of another is sometimes so perfect, that the most experienced are at fault in detecting the falsehood. You know that the bank notes are often so well imitated as to deceive the most wary, and that the officers of the very bank defrauded have been deceived, and received them as genuine. In a late interesting case tried in the state of New York, the question arose on the genuineness of the signature of the defendant to a promissory note, on which the action was brought. The defendant was a lady of the highest respectability and of independent fortune. Nearly one hundred witnesses were examined, comprehending clerks and cashiers of banks, particularly skilful in

[Murati v. Luciani.]

the examination of writing ; also the intimate friends and acquaintances of the party, having long and repeated opportunities to become acquainted with her writing ; and yet no certainty was arrived at, as the witnesses expressed contradictory opinions and belief, and were, if I recollect rightly, about equally divided. Such is the proof of handwriting, when made either by the direct testimony of witnesses professing to be acquainted with it, or by a comparison with other writing admitted to be genuine. But it is upon such proof that jurors are often called upon to decide, and they must do so by a careful consideration of all the evidence, and of the circumstances attending the transaction, weakening or strengthening the probability of the truth of the instrument, and keeping in mind, that the burthen of proof lies on the party producing the instrument.

The defendant has given in evidence some circumstances to support his denial of these notes, which will probably have no inconsiderable weight on your mind, if you shall not be satisfied by the more direct testimony. In the first place you have proof of the absolute poverty of the plaintiff, from his arrival in this country down to his passage to Charleston with captain Baker, who took him to Charleston, then in the employment of the defendant, and taking his, the defendant's goods to be disposed of in that city ; and but a short time before it is alleged that these notes were given. We have seen no means he had in that short period to acquire property. While in Charleston, even by his own account, he sold but little ; hardly more than was required for his daily expenses. He could not pay some small bills, nor his passage, or the freight of the goods he took with him. His marriage does not relieve him from this difficulty, as we have no account of any property obtained by his wife ; indeed, after his marriage, he writes that he is unable to get any money to remit. One of the items making up the note of the 24th of November, and expressly mentioned in it, refers back to the 25th of August, and the rest is said to have been the profits of the mutual business carried on by the plaintiff and defendant. But where did he get the 200 dollars first mentioned, and what was the business which produced him the remaining 400 dollars ? We have no account of either. His journey to New York was, clearly, solely on Luciani's account. The case of the plaintiff is certainly very deficient in proof of the means by which the defendant could become indebted to him ; but, nevertheless, if you are satisfied that the notes are true and genuine instruments, it will be enough for you, as they, *prima facie*, prove their

[Murati v. Luciani.]

own consideration. Another fact is a proof to you which thickens the mystery of these transactions, and increases your difficulty in comprehending them ; I refer to the note for 300 dollars given by the plaintiff to the defendant, dated on the 27th of November 1826. This was but three days after the first note, and one day after the second on which the plaintiff brings this suit ! Why should the plaintiff give his note to the defendant for 300 dollars when he held his notes for a much larger amount ? Why not credit the 300 dollars against these notes ? The plaintiff charges this note as a forgery by the defendant : thus they charge each other. It is really unreasonable in these men to expect that you can discover the truth of their dealings, when they have involved them in so much contradiction and obscurity. If you shall fail to reach the justice of the case, they will have no reason to complain. So far, it would seem to me that on the question of the genuineness of these notes, the preponderance of evidence is against them ; but another paper is produced which puts us all at fault again ; I mean the list of goods dated the 29th of November 1826 ; this has created the greatest difficulty to my mind. You will recollect that the note of the 26th of November is for the delivery of goods by the defendant to the plaintiff at Charleston, of the value of 600 dollars. The paper or list produced, dated three days after the note, is admitted to be genuine ; it is signed by the defendant with his own proper hand. Is this, then, the invoice or list of the goods which he undertook to furnish to the plaintiff by the note of the 26th of November ? If it is, then it proves the genuineness of that note, as they must be taken to be parts of the same transaction ; yet even if this be so, it does not conclusively follow that the note for the delivery of the goods was given in consideration of the sum of 600 dollars paid and advanced by the plaintiff to the defendant. It affords proof of the genuineness of the note, but not of the consideration on which it was given. What does this paper allude to ? How did it come into the possession of the plaintiff ? It is headed, " What is to be received by the Langdon Cheves, in Charleston, before the 25th of December 1826," and is signed by Luciani. Now the note of the 26th of November promising to deliver the goods, also states that they shall be delivered before the 25th of December, and so far we have a connection between them. The defendant avers that it was nothing more than a memorandum of the goods he was to send, on his return to Philadelphia, to the plaintiff at Charleston, to be sold by him for, and on account of, him, the defendant. If this were so,

[Murati v. Luciani.]

why was it signed by the defendant? As a mere memorandum to govern him in the selection of the goods he was to send, this was not necessary. But the greater difficulty is, How came it in the hands of the plaintiff? for if it was to assist the memory of the plaintiff, he should have brought it with him to Philadelphia. The counsel of the defendant have charged the plaintiff with bold fraud in getting possession of this paper, they do not know how, and using it as the means of perpetrating the still bolder fraud in fabricating these notes. It is, they allege, by copying the signature of the defendant to this list of goods, that he has been able to forge the name of the defendant to the notes. This argument certainly assumes that the notes are false; and if they be so, it is of little importance by what means or assistance the forgeries were committed. This is the question submitted to you, with a remarkable deficiency of evidence to guide you in the decision of it for the one side or the other.

If you shall be finally satisfied that these notes are genuine, and that they are bona fide evidences that the debts and claims mentioned in them are due from the defendant, you will then take up the account which the defendant has produced, under his plea of set-off, against the plaintiff, and strike the balance as it shall appear to you to be just between them. If you shall reject the notes as false and spurious, the defendant will then be entitled to your verdict for so much as you shall find to be due to him. You must do this, under the provisions of the act of assembly of this state, by finding a verdict for the defendant, and certifying the amount you find to be due to him.

Verdict for the defendant, with a certificate that there is due to him from the plaintiff the sum of 404 dollars 53 cents. (a)

(a) It would seem that the jury admitted that the notes were genuine, for the account of the defendant against the plaintiff was upwards of 1700 dollars, exclusive of the 300 dollar note.

THE foregoing cases were argued and decided after Judge WASHINGTON was prevented, by the sickness which terminated in his death, from taking his seat on the bench. It is expected that the chasm between the conclusion of the fourth volume of the "Reports of the Circuit Court of the United States for the Third Circuit," and the commencement of this volume, will be filled up by the publication of the cases determined in that period. It is hoped that this will be done, as it is highly important that all the decisions of that great judge should be given to the profession.

The case of Herman v. Herman was argued and decided while Judge WASHINGTON was on the bench, but the judgment of the court was delivered by Judge HOPKINSON. The case was argued with great labour and ability, and contains several interesting matters of law. We have not been able to give it in its proper place, because the opinion of the court has been mislaid. Should it be recovered in time, the report of the case will be prepared for the appendix of this volume, or for insertion in the next.

Circuit Court of the United States.

NEW JERSEY, APRIL TERM 1830.

BEFORE

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. WILLIAM ROSSELL, District Judge.

CUSHMAN V. WADDELL.

In an action of assault and battery to which the general issue is pleaded, the defendant may give in evidence his state of mind, caused by an excitement or provocation so recent or immediate, as not to allow the blood to cool.

The legal effect of such evidence is not to excuse the defendant from paying compensatory damages, but will excuse him from paying such as are exemplary.

If the alleged provocation is a previous assault and battery by the plaintiff of the son of the defendant, evidence of the transaction is not admissible; but the defendant may give in evidence the appearance of the son, and the account he gave to the defendant at the time he first saw him, so as to enable the jury to decide on the cause and extent of the provocation.

THIS was an action of assault and battery, plea not guilty, issue, &c.

The plaintiff was a schoolmaster in Trenton, under whose care the defendant had placed one of his sons, who had been severely punished by the plaintiff for some offences. He was seen by his father immediately afterwards, when the appearance of the boy indicated the infliction of serious injury. The father went to the boarding house of the plaintiff, attacked and beat him severely, accompanied with very intemperate and vindictive language, and other circumstances of aggravation.

[Cushman v. Waddell.]

The defendant offered, in mitigation of damages, to prove the correction of the son by the plaintiff to have been a cruel, wanton, and undeserved one, and to give all the circumstances attending it in evidence.

Mr Southard and Mr Scott, for the plaintiff, objected to the admission of this evidence, on the ground that an action of assault and battery was now pending against the plaintiff for the same act, and that on the general issue, the defendant could give nothing in evidence except what occurred at the time of the assault and battery, or some immediate or recent provocation, before the blood had time to cool. *Lee v. Woolsey*, 19 Johns. Rep. 319; 1 Saund. Pl. and Ev. 106, 127; Bull. N. P. 17; *Avery v. Ray*, 1 Mass. Rep. 12, 14.

The plaintiff will be taken by surprise by evidence of any thing not happening at the time, or so immediately preceding it as to make the provocation a part of the *res gesta*, and the court will not collaterally examine into the merits of the suit for the correction of the son.

Mr Halsey and Mr Wood, for the defendant, contended, that:

Inasmuch as the matter now offered in evidence was in mitigation of damages only, and could not be pleaded in justification to the action, it was admissible to show the state of mind of the defendant; 3 Starkie 1460; 2 Bos. and Pull. 2245, note; 12 Mod. 232; the absence of malice; 1 Penn. 169, S. P.; or a high degree of excitement on seeing the situation of his son, after he had been punished; as in 1 Hale's P. C. 453; 12 Co. Litt. 87; *Rowley's Case*, Cro. Jac. 296.

The provocation is part of the *res gesta*; and on a mere question of damages, it is proper for the jury to know its nature and extent, so as to enable them to decide whether the assault and battery was the result of passion, and excited feelings, under recent provocation, or deliberate and maliciously intended injury.

BY THE COURT.—We cannot go into evidence of the circumstances attending the correction of the defendant's son by the plaintiff, as it would be neither a justification, or mitigation of damages in this action, however aggravated the case may have been on the part of the plaintiff. We therefore reject the evidence offered, so far as it respects the nature of the infliction on the boy: but we think evidence admissible to show the situation of the transaction; the

[Cushman v. Waddell.]

account he gave of it on his father's first seeing him; and the conduct and declarations of the latter, from that time to the attack on the plaintiff; otherwise the jury cannot decide whether the defendant acted under the influence of the sudden excitement produced by the situation and story of his son, or a disposition to inflict a wanton injury or disgrace upon the plaintiff.

The evidence was admitted. The only question for the jury was the amount of damages. THE COURT laid down the following as the rule of law by which they ought to be guided:

That whether the defendant acted wantonly and maliciously, or under the excitement of the occasion, the plaintiff was entitled to such damages as would compensate him for any injury he may have sustained in his person, or his occupation, and all expenses incurred in consequence of the injury. That no provocation, however great or immediate, could excuse the defendant from making full compensation for all the plaintiff had suffered by the unlawful attack on his person; nor could any provocation, so remote in point of time from the infliction of the injury to his son as to allow the excitement to subside and leave the defendant to act coolly and deliberately, be any mitigation of damages. But if the jury were satisfied that he acted in the heat of passion caused by the appearance and account of his son, without any previous malice towards the plaintiff, or any deliberate design to injure him in person or the estimation of the public, it was a circumstance which ought to operate powerfully to reduce the damages to such as would be compensatory.

If death had ensued from the blows inflicted by the defendant, his offence would have been murder or manslaughter, according to the degree of excitement or deliberation with which it was committed. The same rule is applicable to actions for personal injuries, whenever a plaintiff claims damages beyond those which afford him remuneration for all injuries he has sustained.

The jury found a verdict for 1500 dollars. A motion was made for a new trial, on account of excessive damages, but before any decision of the court, the case was compromised.

BENNETT v. BOGGS.

The compact between New Jersey and Pennsylvania recognises the right of fishery in riparian owners on the Delaware.

The third section of the act of 1808, defining a fishing place, applies only to shore fisheries : a common right of fishery is necessarily indefinite.

The penalties of the law of 1822 attach to any person who uses a gilling seine or drift net on the Delaware, unless he has the right of fishing on the opposite shore.

An entry under this law by a person claiming only by common right is void.

This court must decide on a state law precisely as the courts of the state ought to do.

The act of 1822 is not repugnant to the constitution of the United States.

The proprietors of New Jersey had no right in the Delaware beyond low water mark.

The right to the bed of the river was in the crown, therefore the compact of 1676 did not give a common right of fishery therein.

The rights of the crown devolved on the states by the revolution, and were confirmed by the treaty of peace to them in their sovereign capacity.

The constitution of New Jersey confers general powers of legislation.

The legislature has power to regulate fisheries on the Delaware, by prohibiting the exercise of a common law right.

The only restraint upon them is, that they cannot, by any law, impair the obligation of a contract.

If a right is not founded in a contract, or secured by the constitution, it may be taken away by a state law, however long it may have been exercised.

This court can inquire only into the constitutional power of the legislature ; not on the policy, justice, or wisdom of their acts.

Neither the state or federal constitution secures a common right of fishery in the Delaware to the people of New Jersey.

THIS case came before the court on a case stated by counsel, as follows :

“This action is brought for the recovery of eight penalties, under the seventh section of the supplement to an act of the legislature of New Jersey regulating fisheries in the river Delaware, passed November 28th, 1822, and assented to and adopted by the legislature of Pennsylvania January 29th, 1823, prohibiting the use of gilling seines in said river, except in certain cases, mentioned in a previous section of the act, under a penalty of 250 dollars for each and every such offence.

“The plaintiff resides at, and rents, and fishes a shore fishery in the township of Waterford, in the county of Gloucester. His haul is from the upper line of the lands of Benjamin Cooper down to the mouth of Cooper’s Creek. Petty’s Island lies between this fishery

[Bennett v. Boggs.]

and the Pennsylvania shore. On part of this island, on the Jersey side, is another fishery ; so that the two seines sweep partly over the same pool, when out, though hauled in on different sides of the river. These gilling seines are made of fine twine, so as to be imperceptible to the fish, whilst the water is turbid from the spring freshets, when they are most successfully used. They are usually about fifty or sixty fathoms in length ; are extended across the channel, and drift with the tide. In passing up the river, all the fish which come in contact with them, and are too large to pass through the mesh of the net, are entangled by their gills, and, seldom able to extricate themselves, are thus taken, from whence these seines derive their name. The defendant's net was of the size authorized by the act to be used in certain cases. The defendant is a citizen of Pennsylvania, and resident in the county of Philadelphia. He owned a gilling seine, and was in the habit of drifting between the island and Jersey shore, both in and below the pools of the above named fisheries. On the 23d, 24th, 25th and 26th days of March last, the defendant and one William Eager were drifting in the channel of the river with their net, opposite to the fishery of the plaintiff, when their net and boat were seized on the last named day, at the instance of the plaintiff, and the summons in this cause served on the defendant. This seine, when taken, was not within the sweep of the plaintiff's net, nor so as to obstruct him in his haul. The boat and seine were adjudged to be forfeited by two justices, and ordered to be sold. The defendant appeared on the return day, and caused his appearance to be regularly entered. The defendant has given a bond to the prothonotary of the court of common pleas of Philadelphia county, accompanied by the following description, viz. : (Description) "From Samuel Bower's wharf and lands at Kensington to Fisher's Point, the size of the net is about fifty fathoms, and of a mesh of about six inches. Samuel Boggs." (*Prout* the bond and description.) It is admitted that there is a mistake or clerical error in this description, and that it should have been *Fish's* Point, instead of *Fisher's*, there being no such place as the latter. Bower's lands and wharf are in Kensington, in the city and county of Philadelphia, in the state of Pennsylvania ; and Fish's Point is in the township of Waterford, aforesaid, in this state, about five miles above Kensington. On each side of the river there are numerous owners of the shore within the bounds of this description, from whom the defendant had no lease or permission to enter a fishery in front of their

[Bennett v. Boggs.]

lands. The defendant, when taken, was drifting within the bounds named in his description, that is to say, below Fish's Point, and above Bower's wharf, nor had he at any time fished above low watermark with his seine, or entered upon the shore of the plaintiff, but had always drifted in that part of the river which is covered with water at all times of the tide. (These fisheries on the river Delaware have been used and occupied by the respective owners of the adjacent shores as private property, before and ever since the revolution). The defendant therefore insists that he has a right to fish with his seine in any part of the river Delaware, by virtue of the aforesaid bond and description within the bounds therein mentioned. But he furthermore insists that the act under which the plaintiff seeks to recover is unconstitutional and void, being in restriction of a right common to all the citizens of the United States, and that no recovery can be had by virtue thereof. The plaintiff insists that the bond and description given by the defendant is not in compliance with the act, and that he had no right to drift with his net in the river Delaware; and, moreover, that the said act is constitutional, and the provisions therein contained wise and salutary, and greatly beneficial to the community, in preserving a valuable species of fish, which the gilling seines have a tendency to destroy and frighten from our waters. Upon this statement of facts it is agreed to submit this case to the court. If they shall be of the opinion that the defendant was authorized under the act to fish by virtue of his license, or that the act is unconstitutional, then that judgment shall be entered for the defendant, with costs; otherwise, that judgment shall be entered in favour of the plaintiff, with costs of suit. And it is further agreed that the copies of the several acts of the states of Pennsylvania and New Jersey, relative to fisheries in said river, printed in the Pamphlet Laws of said states, shall be read in this court; and that either party shall be permitted to turn this state of the case into a special verdict." Dated, September 9th, 1829.

The act of New Jersey, on which this suit is founded, is contained at large in the Pamphlet Laws of 1823, p. 30, and in the Laws of Pennsylvania of the session of 1822—1823, p. 19: the points material to this case are the following:

The fourth section, Pamphlet Laws of Penn. 1823, page 19, &c., Laws of New Jersey 1823, page 30, enacts, that every owner or possessor of a fishery on the Delaware, within the jurisdiction of New Jersey, shall, before he occupies the same, give to the clerk

[Bennett v. Boggs.]

of the court of common pleas of the county wherein the fishery, or the greatest part thereof, may be, a description in writing of their pool or fishing place, designating the beginning and ending point, the extent on the river shore, the township and county where situated, the number of men generally employed in fishing the same—and shall give bond with surety to the said clerk, to the amount of 500 dollars, conditioned for the payment of all fines and penalties created by this law, and incurred by any infraction thereof; which description and bond shall be filed in the clerk's office. If any person shall fish in any fishery so entered, or draw a net within the same, or in the river opposite the shore included within the boundary thereof, without the permission of the owner or possessor, he shall forfeit 250 dollars. By the fifth section, the same penalty is imposed on any person who shall make use of a seine or net in the Delaware, within the jurisdiction of the state, or of the concurrent jurisdiction of the state and Pennsylvania, between the 1st of April and 10th of July, without having so entered their fishery, or at any place on the Delaware within the state, other than opposite the shore boundaries of a fishing place or pool so described and entered.

Section sixth, Pamphlet Laws of Penn. 21, authorizes the owner or possessor of any fishery on the Delaware, within the jurisdiction of the state, below Trenton, who has entered the same as a fishery, and given bond to fish in front of, and opposite the bounds thereof, with a gilling seine or drift net of mesh not larger than six and a half inches, and the net not more than six fathoms in length—the boat used, to have the name and place of abode of the owner painted legibly on the gunwale thereof.

The seventh section imposes a penalty of 250 dollars on any person who shall use a gilling seine or drift net in the Delaware within the sole or concurrent jurisdiction of the state, without first entering his seine or net, and giving bond, or beyond the angles of the shore boundaries of a fishery so entered, or with a mesh larger or a net longer than mentioned in the sixth section, between the 1st of March and 10th of July.

The thirteenth section, in addition to the penalties, creates a forfeiture of the boat, seine, net and tackling, used in violation of the law.

This act was a supplement to an act of 1808, which, in the third section, defined a pool or fishing place to be “from the place or places where seines or nets are usually thrown in, to the place or places

[Bennett v. Boggs.]

where they have been usually taken out ; or from the place or places where they may hereafter be thrown into the water, to the place or places where they may be taken out." The fifth section imposes a penalty of 100 dollars on any person who shall use a gilling net in the Delaware. 5 Smith's Penn. Laws 8, 9.

Both of these laws were adopted in Pennsylvania, and declared to have the same effect on the citizens of that state as on those of New Jersey.

This was deemed necessary by Pennsylvania, as by the compact between the two states, made in April 1783, it was agreed that the river should be a common highway for each state, with concurrent jurisdiction on the water, each retaining jurisdiction on the dry land between the shores, and that all offences or trespasses committed on the river, should be cognizable in the state where the person charged should be first apprehended.

By a proviso in the third clause, the legislature of each state may exercise the right of regulating and guarding the fisheries on the Delaware annexed to their respective shores, in such manner that the said fisheries may not be unnecessarily interrupted during the season for catching shad, by vessels riding at anchor on the fishing ground, or by persons fishing under claim of a common right on said river. 2 Dall. Laws 143, 145; Patterson's Laws 47, 49, 76, 77. The declaration set forth, that on the 23d of March 1829, at the township of Waterford, county of Gloucester, and state of New Jersey, the defendant made up a gilling seine or drift net in the river Delaware, without having entered his gilling seine or drift net fishery, or giving bond or making a description of his pool or fishing place, or designating the number of men employed therein according to law. It also set forth the same act committed on some other different days. The defendant pleaded *nil debet*.

Mr Wall and Mr Wood, for plaintiff.

1. The entry of the defendant is not such a one as is contemplated by the sixth section of the act of 1822, and will not excuse him from the penalties of the seventh section. Such entry can only be made by the owner of the land on the shore of the river, and for a pool or fishery in front thereof: that made by the defendant is for a fishery in the Delaware, opposite the land of others, where he can acquire no right under the fourth section: he comes, therefore, directly within the penalties of the law.

[Bennett v. Boggs.]

The only question which can arise is on the validity of the law, on the ground of its repugnance to the concessions made by the proprietors of Jersey in 1676 (Leaming & Spicer 390), the constitution of the state, and the United States.

The grant from the king to the duke of York, and from him to Carteret and Barclay, was bounded by the river Delaware: so was the grant to William Penn. Leaming & Spicer 3, 8, 10. The right to the bed and waters of the river was therefore in the king, and neither of the proprietors could have any right therein, or to the islands or fisheries. 1 Chalmers's Opinions 59; 4 Wash. C. C. 384; Corfield v. Coryell, 5 Wheat. 374, S. P.

As the river was the property of the crown before the revolution, the right to it devolved on the two states by that event; they claimed to the middle of the river, and the treaty of peace with Great Britain confirmed and ratified their claim. The concessions of the proprietors of Jersey, in 1676, could not bind the crown, or the states on whom its rights devolved; the proprietary governments were mere riparian owners, who might grant any rights to low water mark, but no further. Though they claimed and exercised the right to regulate the fisheries in the Delaware before the revolution; L. & S. 480, sect. 13; Allison 279, ch. 412, 80, 559; yet it was without any authority over the bed of the river.

Immediately after the peace, in April 1783, New Jersey and Pennsylvania made a compact by which the Delaware was made a common highway, with a proviso that each state might regulate the fisheries annexed to the respective shores, so that they might not be interrupted by vessels at anchor, or persons fishing by common right. Rev. Laws N. Jersey 57; 2 Dall. Laws 143, 145.

This was an express recognition of the rights of riparian owners to the fisheries on the shores of the Delaware, as they had existed from time immemorial in New Jersey. They were subject to the public rights of navigation, and of government in their regulation, but the shore owners had the exclusive right of fishing in front of their lands; the laws regulating such right affirmed its existence, and were passed for their protection. The right of fishery was descendible and alienable as other property, and might be conveyed separate from the land to which it had belonged, and as such has been uniformly recognised by the laws. Patterson 417, 543, 653. There is no common right of property in New Jersey, and the public right consists only in jurisdiction. 4 Griffith's L. R. 1286, 1294. So far as the right of

[Bennett v. Boggs.]

fishery in navigable waters is public, it may be regulated by law at the discretion of the legislature. Vattel, b. 1, ch. 20, sect. 234, 235, 239, 244—248, p. 168.

But if the right is common, the legislature of New Jersey has full power, by the state constitution, to regulate and control this right as they please, both as the sovereign power of the state, and by the rights which devolved on the state from the crown. The compact between the states was before the adoption of the constitution of the United States, which cannot have a retrospective operation upon it, on general principles. Ruth. N. L., ch. 5, p. 88, 99.

Neither the compact or the laws are repugnant to the constitution: it has been decided by this court that the laws regulating oyster fisheries are constitutional; 4 Wash C. C. 377, 378; 9 Wheat. 203; 2 Pet. 251, S. P: the same decision has been made in Pennsylvania. Keen v. Rice, 12 Serg. & Rawle 203.

The right of a state to regulate fisheries has been recognised in Massachusetts; 5 Mass. 266, 269; in Connecticut, 2 Conn. 481; in New York, 20 T. R. 90; and New Jersey, 1 Halstead 78.

It is a general principle of jurisprudence, laid down by all writers. Harg. L. T. 10, &c.; Angell on Water Rights 102, 108; Chitty on G. L. and Fisheries 425; 1 Bl. Comm. 160.

It cannot be denied that this power was in parliament, or that the powers of parliament devolved on the states by the revolution; 4 Wheat. 651; 8 Wheat. 584; and the constitution of New Jersey has imposed no restriction on the power of the legislature, who may limit, restrain and control the right of fishery in the Delaware, whether it is common or public, or grant the exclusive right to riparian owners.

Their rights have been always recognised; and from their long enjoyment without interruption, a public grant will be presumed; 6 East 214; Bealy v. Shaw, Cowp. 102, 103; 3 D. & E. 159; 3 Bl. Comm. 264; and when the right enjoyed has been exclusive, the grant will be presumed to have been so.

The prohibition of the constitution of the United States against impairing the obligation of contracts, extends only to private rights; 4 Wheat. 629, 630; not to public corporations; 9 Cranch 52; nor to a law directing payment for improvements on land recovered under an adversary title; 2 Gall. 138; nor to an *ex post facto* law passed by a state during the revolution; 5 Cranch 173.

Admitting that there was a common right of fishery in all the inhabitants of the state, it was competent for the legislature to take

[Bennett v. Boggs.]

it away, and give the exclusive right to riparian owners, as it did not impair the obligation of a contract. It is no constitutional objection to a state law that it takes away a vested right, unless it is repugnant to the constitution of the state. *Satterlee v. Matthewson*, 2 Peters 410.

Mr Croxall and Mr Southard, for the defendants.

The legislature may regulate the fisheries in the Delaware by prescribing the mode, &c. of catching fish, the kind of seines, the time of the year for fishing, and otherwise direct how the common right of fishing may be enjoyed. But they cannot prohibit the exercise of the right, which is common to all the inhabitants of the state, to fish in the Delaware, which is an arm of the sea, a navigable river, where the tide ebbs and flows as far as Trenton. This right is secured by Magna Charta to all the subjects of England, and cannot be made private property. Paley's Mor. Phil. 80. The enjoyment of this right is secured to the public in all civilized nations; the sea, the shore, and right of fishing therein, is common property, which cannot be appropriated to private use. Code Napoleon, Justin 67; 1 Pandects, tit. 8; 3 Kent's Comm. 342; Grotius, b. 2, ch. 3; Puff. b. 4, ch. 6; 2 Domat. 400, b. 1, sect. 1.

The title to tide water rivers and arms of the sea, by the law of England, is in the king, for common benefit, and he cannot by his prerogative grant them for private purposes, since the adoption of Magna Charta. Bracton, b. 12; Glanville, b. 9, ch. 2; 1 Reeve's Hist. C. L. 224; Davis 56; Chitty on Fish., 243, 269. The king's grant can give an exclusive right to take none but royal fish; 1 Mod. 105; 6 Mod. 73; a subject has a right to fish in all navigable rivers for common fish; Salk. 357; and no prescription against this common right is good; 4 D. and E. 439; 6 Mod. 163; Will. 161; or for a free or exclusive fishery, unless the prescription goes as far back as the time of Henry II.; 2 Bl. Comm. 39; 2 Inst. 30, 272; Magna Carta, sect. 3.

It is a bad traverse to set up a private right of fishery in an arm of the sea. 2 H. Bl. 182.

Prima facie, every subject has a right to take fish on the sea shore, between high and low water mark; 2 Bos. & Pull. 472; and by the common law there can be no private right below low water. Beyond that, the right is a public one, a *res sacra*, which is unalienable, as it concerns the country at large; Shulze on Water Rights 10, 17, 62

[*Bennett v. Boggs.*]

to 73; a private grant is good only so far as it does not interfere with the public right. *Ibid.* 79, 128.

The charter to the duke of York could give no private right of fishery in the Delaware below low water mark; a grant from the proprietors could not give it; and this, with the other principles of the common law, was adopted on the settlement of this state; 1 Bl. Comm. 157, 167; 1 Mass. 60; 8 Cranch 242; and by act of assembly it was declared, that no man should be deprived of the benefit of the common law. L. & S. 128, 129, 369. The duke of York was bound to govern according to the constitution of England; 1 Halst. 70; and the constitution of the state continued the common law, and such statutes as had been practised on before its adoption. Art. 22.

The proprietors of New Jersey, in 1676, recognised the rights of the inhabitants according to the common law; granted them a common right of fishery in all the waters of the colony; L. & S. 390; and subsequent laws have confirmed this right. Allison 309, 347; Patterson 18, 79.

This right is so highly respected, that where A threw oysters into a public river in which there was a common right of fishery, and B took them away, A could not recover damages; 1 Penn. 391; on the other hand, a person who fished in the Delaware by common right, recovered damages for cutting his seine; 2 Penn. 936; and no law was ever passed denying this common right till 1808. Rev. Laws 551.

There is no private right of fishery in the waters of this state; 2 Penn. 943; the shore owners have an exclusive right of drawing seines upon their land; but in the water, beyond the ebb of the tide, they have only a common right; *Arnold v. Mundy*, 1 Halstead 78; such is the law in Pennsylvania; *Carson v. Blaiser*, 2 Binn. 475; and in the other states the private right of fishery depends on the ownership of the bed of the river; 17 Johns. Rep. 195; or on a grant to low water mark; 2 Conn. 481; 6 Conn. 518; 4 Mass. 315, 140; 3 Greenleaf 269. There must be an express grant by the state to give a private right beyond it. 3 Kent's Comm. 336, 344. When a river is the boundary between two states, they have each a right to the middle: but there can be no private property by virtue of riparian ownership beyond the low watermark. 5 Wheat. 374.

No grant can be presumed in favour of the shore owners which the proprietors were not authorised by the charter or the deed of

[*Bennett v. Boggs.*]

the duke of York to make ; they had no right in the bed of the river ; and as their express grant could confer no right, a grant by prescription could have no more force.

But if such a grant could be presumed in a common case, it cannot be where it would be unconstitutional. 16 Mass. Rep. 488.

The common right of fishery was secured to the inhabitants of the state by the compact of the proprietors in 1676, which no law can impair ; it is an inviolable right (1 Bl. Comm. 48), which courts will protect by declaring a law repugnant to it to be unconstitutional, and void. 1 Binn. 419 ; 2 Dall. 304.

The legislature cannot take away a vested right ; 7 Johns. Rep. 493 ; or transfer the property of A to B ; 2 Bay 252 ; 2 Cranch 277 ; 2 Dall. 210 ; 6 Cranch 135 ; nor shall the general words of a law receive such a construction as to affect existing rights. 4 Burr. 2462.

The right to regulate the public or common right of fishery gives no power to destroy it, or to grant an exclusive right to shore owners. The use of gilling nets may be prohibited as a matter of expediency, but the right to use them cannot be prohibited to the people generally, when it is granted to a particular class. If this mode of fishing is prejudicial to the public, it is equally so by whomsoever it is done. Though the general powers of the legislature are competent for all purposes of regulating fisheries within the state, yet they have no authority to give to riparian owners the right claimed under the laws in question, nor to make it penal for the other inhabitants of the state to exercise a right secured to them by the common law and Magna Charta.

The opinion of the Court was delivered by BALDWIN, J.

Two questions are submitted to the court : 1. Whether under the laws of this state the defendant has a right to fish with a gilling seine or drift net in any part of the river Delaware, within the boundaries specified in the description of his fishery ; 2. If he has not such right, whether these laws are constitutional.

The definition of a pool, or fishing place, in the third section of the act of 1808, which is still in force, enables us to ascertain the true object and meaning of the law in requiring every owner or possessor of a fishery on the Delaware, to describe his pool or fishing place according to the fourth section of the act of 1822.

Connecting the proviso in the compact of 1783 with the third

[Bennett v. Boggs.]

section of the law of 1808, and the fourth section of that of 1822, we can have no doubt of the meaning of the legislature in every part of the law. The compact authorizes the guarding of fisheries on the river annexed to the respective shores, against interruptions by persons fishing under claim of common right on the river; thus making a plain distinction between a fishery annexed to the shore, and a fishery by common right on the river. The words, fishery, pool, or fishing place, as defined in the act of 1808, can apply only to a place on the shore to which a fishery is annexed, and there can be no pool or fishery in reference to fishing by claim of common right on the river.

A person thus fishing can be in no sense the owner or possessor of a fishery; there can be no pool or fishing place which is his by any other right than what is common to all the inhabitants of the state; it cannot be that fishery intended by the compact, and be guarded against the claim of common right, without placing both the compact and laws in direct contradiction with themselves. To a fishery by claim of common right there can be no locality of township or county—no beginning or ending point—the extent on the shore cannot be defined: the bond to be given is a security for infraction of the law “at such fishery” by command or permission of the owner or occupant of such fishery, by himself or tenant—and could never have been intended to be given by one fishing by common right. The recovery on the bond is contemplated to be against the owner, possessor, tenant or agent, and a penalty is imposed on any persons who shall fish in the fishery so entered, opposite the river shore included in the description, without the permission in writing of the person owning, possessing and entering the same; words which in their nature exclude claimants by common right, who cannot enter or describe what they cannot own or occupy in their own right. The words of the law, the meaning of the legislature, are too plain to admit of a doubt; they can have no other application than to the owners of land on the shores of the river to which fisheries were annexed; they were bound to describe and enter their fisheries, and give their bond, according to law. By doing so they were secured in the exclusive right of fishery in their own pools, opposite their own lands, and acquired the right of using in front of their boundaries gilling seines or drift nets, which were prohibited by the fifth section of the act of 1808. To give any person any right under the law of 1822, or to avoid the penalties for using gilling seines, he must have, as owner or possessor, a fishery to enter.

[Bennett v. Boggs.]

It would be nugatory to enter and describe what he neither owned, occupied, or claimed in his own or any derivative right. The case before the court affords as strong an illustration as could be made. The defendant lives in Philadelphia, he owns or claims no part of either shore of the river, which is owned by other persons, from whom he has no permission ; yet he enters as his fishery a space of five miles, from Kensington to Fish's Point, comprehending both shores. A single observation suffices to show that this is not such a fishery as is contemplated by the law. If the defendant has a right of fishing within these boundaries, under these laws, he takes away the right of fishing opposite to ten miles of land on the shore from the owners, and enables him to sue them for penalties, if they fish within his boundaries. Such a pretension is too extravagant to be supported, and yet if it stops short of it, the provisions of the law cannot be complied with. The entry must give him exclusive rights within his boundaries, or it gives him none ; and if he may so appropriate five miles on each shore, there can be no limits assigned to this fishery when he is no shore owner.

It is clear then that the defendant is in no better situation by having made his entry than before. He had no antecedent right, and could acquire none by the mere forms he has pursued ; they were evidently for the purpose of evading the laws of New Jersey, which applied only to riparian owners within the boundaries of their own fisheries, annexed to their land, and duly entered. Entertaining no doubt of the meaning and express provisions of the law, we have thought it better to express ourselves in general terms, than to found our opinion on any departure of the defendant's entry from the requisitions and forms of the law : being decidedly of opinion that he could not make an entry and description in any form or manner which could avail him, we have not entered into any examination of its particulars in description or otherwise.

The case stated admitting that the defendant has made use of a gilling seine in the manner stated, he has directly violated the provisions of the fifth section of the act of 1808, and the seventh section of that of 1822, and is liable to the penalties imposed. He could not make the entry required by the fourth section, and therefore was not authorized under the sixth to use a gilling seine or drift net.

This case then, in our opinion, is clearly within the law, and if the law is valid, our judgment must be for the plaintiff.

Sitting in the circuit court, we are bound to decide on the laws of

[Bennett v. Boggs.]

a state precisely as we would if sitting in a state court. 2 Peters 656. They are the rules of our decision, unless they are repugnant to the constitution, laws or treaties of the United States, which are the supreme law of the land, as well in the state as federal courts. Whether these laws are so repugnant, is the next object of our inquiry.

Questions of a similar nature have heretofore occurred in this state. The subject was very fully discussed in this court in the case of *Corfield v. Coryell*, 4 Wash. C. C. 371, 377, which depended on the validity of the laws regulating oyster fisheries, and was most thoroughly considered. It was contended in that case that the law was repugnant to the following clauses of the constitution of the United States: the eighth section of the first article, granting congress power to regulate commerce; to the second section of the fourth article, as to the privileges and immunities of citizens of one state in every other state; and the second section of the third article, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. But the court decided, on great deliberation, that none of these provisions affected the validity of that law. The laws relating to the fisheries are open to the same objections, but they have not been distinctly presented to the court in the argument of this case. We have, however, thought proper to notice them, in order to express our entire assent both to the opinion and the reasoning of Judge Washington. The defendant's counsel have taken another objection to the validity of this law, which, though not directly contended to be founded on that provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, yet must come within it if the ground assumed is correct. They contend that, by the principles of the common law, there can be, neither by grant or prescription, a private right of fishery in an arm of the sea, a navigable river, or one in which the tide ebbs and flows; that the right of fishing in such waters is common to all the inhabitants of the state, and is expressly secured to them by a compact with the proprietaries of New Jersey in 1676; and that the legislature cannot prevent the exercise of that common right. Leaming & Spicer 390.

The charter of Charles II. to the Duke of York, bounded his grant by the Delaware river and bay, 4 Wash. C. C. 384, and comprehended no part of either; the grant from him to lords Carteret and Barclay ran by the same boundaries, so that the claim of New

[Bennett v. Boggs.]

Jersey to any part of the bay or river below low water mark, cannot be maintained by virtue of these grants. The charter to William Penn was bounded on the east by the Delaware, and included no part of the river, the right to the entire bed of which remained in the crown till the revolution, though claimed by the proprietors of New Jersey from a very early period. 4 Wash. C. C. 385, 386. The rights of the crown being extinguished by the treaty of peace, those claimed by New Jersey to the river and bay were thereby confirmed, unless a better title should be found to exist in other states. But these rights accrued to the state in its sovereign capacity, and not to the proprietaries; they claiming only by grant, must be confined to its boundaries; an acquisition after its date could not pass under the charter to the proprietors; it was territory newly acquired, under the operation of the treaty, by New Jersey and Pennsylvania, and by them made the subject of the compact between the two states. It follows, then, that the proprietors in '1676 had no right of either property or fishery in the Delaware, to the common use of which they could grant a right to all the inhabitants of New Jersey; the crown alone could grant a common right of fishery beyond the bounds of the state. The king was no party to a compact made in derogation of his rights, which devolved on the state unimpaired by the unauthorized acts of the proprietors. The mere fact of their claiming beyond the limits of the charter could give them no title. Their compact in 1676 could create no right in the inhabitants which restrained or limited the exercise of the powers of sovereignty over the river, which the state derived from the paramount title of the crown. A compact between the proprietors and people of a state is a contract, the obligation of which cannot be impaired by a state law, but the one in question was without any obligatory force in giving the right of fishing in the Delaware. Its exercise under a claim from the proprietors, was an encroachment on the rights of the crown and the state. The compact was inoperative to confer any right such as is now claimed, although the present laws had never been passed. A repeal of the law would only save the penalty, and the defendant would be still without any right. This clause of the constitution then cannot avail him.

The constitution of this state, adopted the 2d of July 1776, declares that the government of this province shall be vested in a governor, council, and a general assembly. There is no clause restricting the powers of the government as to the subjects of legisla-

[Bennett v. Boggs.]

tion ; no part of it has been relied upon by the counsel of defendant as being inconsistent with their laws in relation to the fisheries in the Delaware ; but they rest their alleged unconstitutionality on general principles.

Congress have declared, in the 34th section of the judiciary act, 1 Story 67, that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States, in cases where they apply.

In determining what is the law of New Jersey, we must look first to its constitution, which is a supreme law, binding on the legislature itself, and if it contained any restraint on the legislative power over fisheries, its obligation would be paramount, but as it contains none, the law which must govern our decision exists only in the acts of the government, organized by the people, under their constitution. We find its powers plenary, unrestrained, and brought into action by the acts under our consideration, which embrace the case submitted to us.

We may think the powers conferred by the constitution of this state too great, or dangerous to the rights of the people, and that limitations are necessary, but we cannot affix them, or act on cases arising under state laws as if boundaries had been affixed by the constitution previously. We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency or justice. We are not the guardians of the rights of the people of a state unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil ; but courts cannot assume their rights.

The supreme court have decided, *Satterlee v. Matthewson*, 2 Peters 412, 413, 414, that a state law, though an unwise and unjust exercise of legislative power—retrospective in its operation—passed in the exercise of a judicial function—creating a contract between the parties to a pending suit where none existed previous to the law—declaring a contract in existence prior to the law, founded on an immoral or illegal consideration, to be valid and binding on the parties—or divesting rights which were previously vested in

[Bennett v. Boggs.]

one of the parties—is neither *ex post facto*, a law impairing the obligation of contracts, or repugnant to the constitution of the United States.

All the decisions of the federal courts, which have declared state laws void, have been founded on their collision with the constitution, laws, or treaties of the United States, or on the provisions of state constitutions, but not on the general principles asserted by the defendant's counsel. Were this court now to adopt them, we should disregard the high authority referred to, and submit state laws to a test as fallible and uncertain as all rules must be which have not their source in some certain and definite standard, which varies neither with times, circumstances or opinions. An *ex post facto* law is one which inflicts a punishment for doing an act innocent at the time of its commission. It is easy to ascertain whether a state law is within this provision. There can be no controversy about the definition of a contract, and if a state law does impair its obligation, it is clearly void. Though it is a very delicate, and has been found a very difficult matter to define the obligation of a contract, or the acts which do impair it; yet there is a fixed and certain standard to which they must be applied, and a definite rule by which to regulate their application. But there is no paramount and supreme law which defines the law of nature, or settles those great principles of legislation which are said to control state legislations in the exercise of the powers conferred on them by the people in the constitution. If it is once admitted that there exists in this court a power to declare a state law void, which conflicts with no constitutional provision—if we assume the right to annul them for their supposed injustice, or oppressive operation, we become the makers and not the expounders of constitutions—our opinion will not be a judgment on what was the pre-existing law of the case, but on what it is after we shall have so amended and modified it as to meet our ideas of justice, policy and wise legislation, by a direct usurpation of legislative powers, and a flagrant violation of the duty enjoined on us by the judiciary act. It is therefore not material to the decision of this case, to examine further into the existence of a right of fishery in the Delaware, common to all the citizens of this state prior to the passage of the acts in question, since in our opinion the admission of such a right would not avail the defendant, it not being protected by any law paramount to those which have regulated or taken it away. A common law right to a common fishery in

[Bennett v. Boggs.]

the Delaware, is to be enjoyed in subordination to the laws which regulate its use. It is a legitimate subject of legislation, and we cannot pronounce the law void because, in the exercise of an unbounded constitutional power, the government of New Jersey have restrained it within limits narrower than those allowed by common law, of common right. Neither do we think it necessary to examine into the extent of the rights of riparian owners in front of their lands. They undoubtedly had rights of fishery to a certain extent, under the colonial government, which were recognised by New Jersey and Pennsylvania, in the compact of 1783. It is admitted, that from a very early period of the history of the state, shore fisheries have been considered as private property, capable of being devised and alienated with, or separate from the land to which they were annexed, subject to taxation, and taxed as other real estate. It is not pretended that there ever existed a common right of fishery in the citizens of the state, on or over the lands thus owned to low water mark; beyond it the states, since the treaty, are owners of the river in full sovereignty, to which no one could acquire any right but by some law or grant subsequent to its acquisition. The existence of such law or contract is not pretended, and it cannot be maintained as a legal proposition, that a mere permissive right of fishery is so solemn as to be incapable of restraint or regulation by the sovereign authority of a state. We can perceive nothing in those laws but the exercise of their legitimate power of sovereignty over its unquestionable domain. The legislature, for reasons of policy of which they are the sole judges, authorized the owners of those fisheries, who have complied with the conditions prescribed in the law, to use gilling seines or drift nets in the Delaware, opposite to their respective fisheries, and to prohibit the use of such seines or nets to all others, under such penalties as were thought sufficient to enforce its provisions. In thus enlarging the private, and restraining the common right of fishery, they have infringed no constitutional injunction; their acts are the law of the state; they apply to the case under our consideration, and we are bound to adopt them as the rule of our decision.

It is said that the case of *Arnold v. Mundy*, 1 Halstead 1, &c., decided in the supreme court of this state, is in opposition to our opinion. We have carefully examined it, and find that the plaintiff claimed under no law of the state, but by virtue of an East Jersey proprietary warrant, surveyed in 1818, on ground covered by

[Bennett v. Boggs.]

water in front of his land. The only question before the court was, whether by virtue of such warrant and survey he had an exclusive right to catch oysters in the water over the ground so surveyed. It was decided that he had not such right, and could not maintain trespass against the defendant, who claimed under common right.

At the time of this decision there was no law giving this exclusive right to the plaintiff, or imposing any restrictions on the defendant: the case depended on the common law of the state, and settled nothing more. The validity of no state law was in question before the court; that of 1822 had not been passed; there was therefore no connection between that case and this in any one principle. If the court, in pronouncing their judgment, or any judge in delivering his opinion, had declared by anticipation that a law like the present would be void, 1 Halst. 78, the declaration would in its nature be extrajudicial, and we could not consider it as a judicial exposition of an existing law. The court, or the judge who gave it, would not be bound by such opinion when the validity of the law came before them judicially; still less could a court of the United States regard it as of any other authority than the opinion of learned and highly respectable judges, on a case not before them. It is a rule of the supreme court, from which it would depart only under very peculiar circumstances, to adopt the decisions of state courts on the construction and validity of local statutes, and the exposition of local common law, but they could not extend this rule to declarations of courts or judges which were not authority even in the courts in which they were made. This court is authoritatively bound by the decision of the supreme court of the United States, but it is only by such as are judicially made. The opinion which would be given on a matter which neither was, nor could be, before them, would be entitled to all possible respect, but would be no authority to control our judgment. It cannot be expected of us to yield a greater deference to what fell from any of the respected judges in the case of Arnold and Mundy, than to similar expressions from one or more of the judges of the supreme court of the United States. 2 Peters 413.

Judgment must be rendered for the plaintiff.

Circuit Court of the United States.**PENNSYLVANIA, APRIL TERM 1830.****BEFORE**

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

UNITED STATES v. WILSON AND PORTER.

On a joint indictment it is not a matter of right to have the defendants tried separately, but it is discretionary with the court.

The United States may challenge a juror in the first instance peremptorily, till the panel is exhausted, after which they can only challenge for cause.

It is a good cause of challenge that the juror has conscientious scruples about finding a verdict which may lead to capital punishment.

If a juror is wrongly named on the panel he cannot be sworn.

Where there are separate trials on a joint indictment, it is no cause of challenge that a juror was sworn on the first trial and found a verdict of guilty, though it is good cause to submit his indifference to triers.

On a challenge for favour, without cause assigned, it will not be submitted to triers.

It is good cause for challenge if a juror does not stand indifferent on account of bias, prejudice, having made up his mind, or expressed an opinion touching the prisoner's guilt or innocence.

It is no objection to the competency of a witness, that a reward has been offered to be paid on conviction of the prisoner, to which witness may be entitled.

The admissions of a prisoner, though they are not in writing or given in his words, are admissible; but the whole of a connected conversation on the subject must be given.

A pardon granted by a governor of a state, under its great seal, is evidence, *per se*, without any further proof.

The evidence of an accomplice cannot be corroborated by his statements at another time, unless it has been impeached.

[United States v. Wilson and Porter.]

The acts of a co-defendant are evidence to show the connection between him and the prisoner in the same offence.

After a witness has been once examined, it is in the discretion of the court to permit him to be examined again on new matter, but not a matter of right.

The word "rob" in the act of congress of 1825, sect. 22, is used in its common law sense.

"Jeopardy," as used in this section, means a well grounded apprehension of danger to life, in case of refusal or resistance.

Pistols are "dangerous weapons;" the offer or threat to shoot with them comes within the law, without proof that they were loaded—the presumption is they were loaded.

Penal laws must be construed strictly to bring the case within the definition of the law, but not so as to exclude a case within its words, in their ordinary acceptation. It is not necessary to a conviction under the twenty-second section, that the carrier of the mail should have taken the oath prescribed by the second section of the act of 1825, or that the whole mail be taken.

All persons present at the commission of a crime, consenting thereto, aiding, assisting, abetting therein, or in doing any act which is a constituent of the offence, are principals.

In a criminal case a jury are so far judges of the law, that they may find a verdict according to their own opinion; but they are as much morally and legally bound by the law as the court. If they acquit against law, the court cannot set aside their verdict; but if the jury convict against law, no sentence will be passed by the court.

An indictment laying an offence in the words of the law creating it is sufficient, as a general rule.

It need not state the county in which the offence was committed; it is enough if it shows that the court had jurisdiction: cases of treason are exceptions.

THE defendants were indicted under the 22d section of the act of the 3d of March 1825, for robbing the mail of the United States with the use of dangerous weapons, and putting the life of the carrier in jeopardy. (3 Story 1992.) The indictment was as follows:

"Indictment.

"In the circuit court of the United States of America, holden in and for the eastern district of Pennsylvania, of April sessions, in the year of our Lord one thousand eight hundred and thirty.

"Eastern district of Pennsylvania, to wit.

"The grand inquest of the United states of America, inquiring for the eastern district of Pennsylvania, upon their oaths and affirmations respectively do present: That James Porter, otherwise called James May, late of the eastern district aforesaid, yeoman; and George Wilson, late of the eastern district aforesaid, yeoman; on the 6th day of December, in the year of our Lord one thousand eight hundred and twenty-nine, at the eastern district aforesaid, and within the jurisdiction of this court, with force and arms in and upon one

[United States v. Wilson and Porter.]

Samuel M'Crea, in the peace of God and of the United States of America then and there being, and then and there being a carrier of the mail of the United States of America, and then and there having the custody of the said mail, and then and there proceeding with said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him the said carrier did then and there of the said mail feloniously rob, and in then and there effecting the said robbery did then and there, by the use of dangerous weapons, to wit pistols, put in jeopardy the life of the said Samuel M'Crea, he the said Samuel M'Crea then and there being as aforesaid the carrier of the said mail of the United States, and having then and there the custody thereof, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

“ And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit on the same day and year aforesaid, at the eastern district aforesaid, and within the jurisdiction of this court, with force and arms in and upon the said Samuel M'Crea, then and there being a carrier of the mail of the United States, and then and there having the custody of the said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him the said Samuel M'Crea in bodily fear and danger of his life then and there feloniously did put, and the said mail of the United States, from him the said Samuel M'Crea, then and there, as aforesaid, a carrier of the mail of the United States, and then and there having the custody thereof, then and there feloniously, violently and against his will, did steal, take and carry away, and in then and there effecting the robbery so as aforesaid described, did then and there by the use of dangerous weapons, to wit pistols, put in jeopardy the life of the said Samuel M'Crea, then and there the carrier of the mail of the United States, and then and there having the custody thereof, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

“ And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit on the same day and year aforesaid, at the eastern district aforesaid, and within the jurisdiction of this court, with force and arms, in and

[United States v. Wilson and Porter.]

upon the said Samuel M'Crea then and there being a carrier of the mail of the United States, and then and there having the custody of the said mail, feloniously did make an assault, and the life of him the said Samuel M'Crea, by the use of dangerous weapons, did then and there put in jeopardy, and the said mail of the United States from him the said Samuel M'Crea then and there, feloniously, violently, and against the will of him the said Samuel Crea, did steal, take and carry away, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

“GEORGE M. DALLAS.

“*Attorney of the United States for the Eastern District of Pennsylvania.*

“True bill. JOSEPH WATSON, *Foreman.*

“April 13, 1830.”

Mr James C. Biddle moved that the prisoners be tried separately, for which three reasons were assigned :

1. That evidence of the confessions of one of the prisoners will be given by the United States.
2. That they are desirous of examining the wife of one of the prisoners as a witness.
3. That the defence of one prisoner will implicate the other.

BY THE COURT. Whatever doubt may have been entertained before the case of *Marchant*, 12 Wheat. 480, it is now settled that separate trials on joint indictments are matters of discretion in the court, and not of right. The court will not interfere where the counsel for the United States agree to separate trials. If, in his opinion, public justice requires a joint trial, the court will not direct a several trial without cogent reasons. As a general rule, the public prosecutor has the right to elect, and the courts are very unwilling to control it. Had he felt it his duty to oppose the motion, we may not have thought it a proper case for granting it; but as he has not done it, we think the third reason assigned a reasonable ground for allowing a separate trial, and direct it accordingly. Vide 5 Serg. & Rawle 60.

The jury were then called in the case of George Wilson. Caleb Coates was called and not challenged by the prisoner, but was challenged peremptorily by Mr Dallas, the district attorney; his

[United States v. Wilson and Porter.]

right to do so was denied by the counsel for the prisoner. Mr Dallas contended that his right to challenge was peremptory, in the first instance, and that the juror might be set aside; but that if the panel was exhausted, he was then bound to show cause of challenge. 12 Wheat. 480; 4 Dall. 212; 3 Hawk. 388, ch. 43; 1 Ch. C. L. 533; 17 Serg. & Rawle 155.

Messrs V. L. Bradford and Kane contended, that inasmuch as there were no peremptory challenges allowed in Pennsylvania, there could be none in this court, in which juries must be designated according to the laws of the state. 1 Story 63, sect. 29 (Judiciary Act). The United States may challenge, for cause, after the panel is exhausted (17 Serg. & Rawle 163; 1 Story 792), but the right now set up was never before claimed.

Mr Dallas was about to reply, but was stopped by the court.

THE COURT observed, that they had known no case where the right now claimed had been allowed to the prosecution; that they would not be the first to do it in a capital case, unless it was clearly established; but that on examining the opinion of the supreme court in the case of the United States v. Marchant and Colson, 12 Wheat. 480, 484, 485, they did not feel themselves at liberty to refuse the qualified right of challenges now claimed by the United States. The law as laid down by that court is, that in England, the crown had an acknowledged right of peremptory challenges before the statute of 33 Edward I., which took them away, and narrowed the right down to those for cause shown; but that an uniform practice had prevailed ever since, down to the present time, to allow a conditional and qualified exercise of that right, if other sufficient jurors remained for the trial, by not compelling the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through, so that it appears there will not be a full jury without the person challenged.

That the right of peremptory challenges allowed the prisoner was not to select the jury who were to try him, but merely to reject such as he pleased, though he could assign no reason for so doing, and that the court would not inquire into what was the United States' prerogative, but simply what was the common law doctrine. The court considering the opinion of the supreme court as a recognition

[United States v. Wilson and Porter.]

of the qualified right of the United States to challenge, directed the juror to be put aside till the panel was exhausted, declaring that if that should happen and the juror be called again, the United States could not challenge him without showing cause.

The panel being exhausted, Mr Coates being again called, stated that he had conscientious scruples against giving a verdict which in its consequences might be the means of taking away the life of the prisoners, whereupon Mr Dallas challenged him for this cause.

BY THE COURT. If the juror should act according to his declaration, his conscientious scruples, it would prevent him from deciding according to the evidence and his solemn affirmation: we should hold it a good cause of challenge if the question remained unsettled, but it has been so held in the circuit court of the first circuit, *United States v. Coonell*, 2 Mass. Rep. 104, and the supreme court of the state, *Commonwealth v. Leshner*, 17 Serg. & Rawle 163. The challenge is allowed.

Before the exhaustion of the panel several jurors were called who had been returned on the venire by wrong names.

John Byrly had been returned by the name of John Byerly; Matthew Pennypacker in the name of Nathan Pennypacker; George H. Pauling in the name of George M. Pauling.

The district attorney objected to their being sworn, the prisoners' counsel neither assenting nor objecting.

BY THE COURT. The jurors cannot be sworn. It would be a mistrial, if it should appear by the record, that the juror sworn was not the same person who was summoned and returned on the venire.

As other questions arose on challenges to jurors in the trial of Porter, it is thought best to notice them here, so that all the decisions of the court on the same subject may be taken in connection, rather than to separate them in reporting the cases distinctly.

In the case of James Porter, on the same indictment, after the jury had returned a verdict of guilty against Wilson, Mr J. C. Biddle moved for a continuance, on the ground of the great excitement prevailing against Porter, which would prevent him from having an impartial trial.

[United States v. Wilson and Porter.]

The court refused the application. They had no reason to believe that any excitement prevailed in the public mind, other than what arose from the trial of Wilson; had they been tried jointly, there could have been no foundation for any complaint of this kind, as the same jury would have passed on both prisoners. If the evidence given in Wilson's case has prejudiced the public mind against Porter on account of their connection in the crime charged upon him, it is the obvious consequence of separate trials, which the prisoner has brought on himself by his application to be tried separately. The motion was overruled.

On the jurors being called and questions being put to them touching their indifference as to the guilt or innocence of the prisoner, the court laid down the rule to be :

That it is a good cause of challenge to a juror that he has a bias or prejudice against the prisoner, and does not stand indifferent towards him touching his guilt or innocence of the crime with which he is charged.

Or if he has made up his mind, or expressed an opinion on the subject.

That having served on the jury in the case of Wilson was no cause of challenge, unless he had formed or expressed an opinion as to the case of Porter.

The court directed the call of the jurors to be continued till two were sworn, to whom no objection was made. They then directed them to be sworn as triers of the indifference of the jurors who were objected to. The suspended jurors were examined on their voir dire, and sworn or rejected accordingly, as the triers reported to the court.

A juror was challenged for favour, but no cause assigned. The court thought this not a proper case to be submitted to triers. This ought only to be done where, from the answer of the juror to the cause of challenge, the court cannot ascertain his indifference; but on the agreement of the district attorney, it was submitted to the triers. The jurors who had served on the trial of Wilson were held to be exceptions from this rule, such service being deemed, in itself, sufficient cause for submitting their indifference to the triers.

The court declared the rule to be, to ask the juror whether he had made up his mind, or expressed an opinion on the supposed guilt or innocence of the prisoner. Vide 1 Burr's Trial 414, 420.

A juror who had served on Wilson's trial, on being examined by

[United States v. Wilson and Porter.]

the triers, was referred by them to the court; his answer was, "If the same evidence is to be adduced against this prisoner as we heard on the last, he is guilty; and so I think, unless evidence should appear to the contrary." It was held good ground for challenge.

If a juror answers that he had stated that if he had been on the jury in Wilson's case he would not have found him guilty of the capital charges, but not on account of any conscientious scruples, it is not cause of challenge.

The substance of the evidence on the part of the prosecution is as given by the stage driver.

Samuel M'Crea was driver of the Reading mail on the 6th of December last. "I left the city at half past two in the morning. There were nine inside, and one outside passenger. It was a post coach. When I got opposite Turner's Lane, the first thing I saw was a man starting out, who got my off leader by the head, and turned him around to the right. Two men then stepped up, one on each side opposite the box, and each of them presented a pistol at me, and ordered me to stop. They cried Stop! stop! or they would blow my damned guts out. I then threw the whip across my horses, and tried to get on, but couldn't. They then struck my lamps with their pistols, and broke them, and put them out. The lamp on the right did not go out directly. The man who was holding the horses' heads then let go, and ran round and put the other lamp out. He put a handkerchief round his face, and struck out the lamp with his pistols. One of them ordered me off the box, on the ground. They then demanded the money from the gentleman who was sitting by my side. The gentleman wanted to keep it, but he thrust his hands into his pockets, and took it out, and his watch, I believe. Then the other robbers took the gentleman's pocket handkerchief and tied his hands behind his back, then stepped up to the coach door and opened it, and told the passengers to come out, one at a time. They did so; and they robbed the nine passengers, one after another. While one did this, the other two stood guard. The two who stood guard were on each side of the coach; I saw one on the right hand; he had a pistol in each hand. I could not see the other. One of them then jumped into the coach, and took the saddle bags and valises, and what he could find, and threw them into the road. There was one leather trunk, I remember. He then came round to me at the front part of the coach, and tried to unfasten the boot;

[United States v. Wilson and Porter.]

but he did not know how. He then ordered me to do it. I unfastened the boot. He jumped up and got hold of the mails, and threw them into the road on the left hand side.

In answer to a question by a juror, witness replied, that the man said, “‘Driver, open this boot.’ The other man presented his pistols at me at the time, and I was afraid he would blow my brains out then, I didn’t know what else to expect.

“The one on the left fell to cutting the mails open, and then jumped down on the right hand, and caught and tied me. He then put the whole ten passengers into the stage again, and ordered me to get up on my seat. I told him I could not; and then two of them took hold of me, one on each side, and threw me up on the foot-board. One of them stepped round on the other side, and took me by the arms and set me on the seat. They then jumped down and took each leader by the head and led them to the fence. They then took the lead reins and tied the two horses to the fence. They then left the stage and walked over to where they had left the mails, as well as I could see in the dark. I suppose they examined them and cleared out. I didn’t see them go. I rose up and tried to see or hear them go off, but could not, they went off so easy. We remained there some length of time; I cannot tell how long. Then one of the passengers came out of the coach and said, ‘Driver, where are you?’ and he took his knife and cut the handkerchief with which I was tied. I then jumped down, and got my horses loose and turned them into the road. I got the passengers in—they were all out when they were tied—and drove back to town. I believe my life was in danger—I do, or I should not have given up the mail. The one who tied me did not keep his pistol in his hands all the time he robbed the passengers. He had his coat buttoned up, and when he went to tie them he thrust his pistol into his breast. The others kept their pistols in their hands. Saw no other weapons but pistols. The mail bag was cut open after it was in the road. The stage was bound to Reading and Harrisburg. Witness had travelled on that road about two months. I believe none of the passengers were armed.”

Cross-examined by Mr Kane.

Q. Who employed you to carry the mail?

A. I was employed by John Miltimore.

Q. Had you ever carried the mail on any other route before?

A. No, I never did.

[United States v. Wilson and Porter.]

Q. Where does Mr Miltimore live ?

A. In Harrisburg.

Q. How did he hire you ?

A. He hired me to drive the stage by the month.

Q. Did he tell you that you were hired to take the mail ?

A. No, he didn't say "the mail."

Q. Did you give any security ?

A. No.

Q. Did you take any oath ?

A. No.

Q. How far did you drive the mail stage ?

A. I drove it to Barnhill, about eleven miles off, and then another driver took on.

Q. What sort of a night was it ?

A. A very dark night. I could not see more than five or six yards off. I could not see exactly what the robber took from the outside passenger.

Q. Where were you at the time ?

A. I was alongside of the passenger, with my whip and reins in my hand, when the robber took from him his money and his watch.

Q. And where did this happen ?

A. This was on the right hand side of the stage; I was sitting on the right hand side; I drove.

Q. And did you and your outside passenger get down on the same side ?

A. Yes, we did.

Q. And you saw the robbers do all you have described ?

A. I was looking at them all the time but could not see much. Both the lamps were put out before I got down.

Q. Now tell me when did you first consider your life in danger ?

A. I believed my life in danger when the man presented the pistol at me. I did not know at what moment he would blow me through.

Q. And when did you first think your life out of danger ?

A. I thought my life no longer in danger after they were all gone, and I had got safe back to town.

The usual time for adjournment having passed, the counsel on both sides and the court consulted with the jury as to their wishes on that matter ; some were for going on with the cause, others for

[United States v. Wilson and Porter.]

an hour's adjournment, and others were for adjourning until the morning. At length it was agreed to adjourn until the morning, the jury in the meantime to be attended by officers who were to see that every proper convenience should be afforded them, and that they should not separate.

The court then adjourned at half past three.

Third day, Wednesday, April 28th, 1830.

At the opening of the court this morning, Mr Kane, one of the counsel for the prisoner, addressed the court, stating that it was with some regret he had read in a respectable morning paper (the United States Gazette), a copy of which he held in his hand, a report of the trial which occupied the attention of the court yesterday, with a full detail of the evidence so far as it had been gone into. He was quite willing to bear testimony to its general correctness; it was not of misrepresentation that he complained.

Judge HOPKINSON. What then do you object to? If the report be a faithful one, it will only communicate to a greater number out of doors what they might have heard had they been here. A thousand, perhaps, witnessed our proceedings yesterday, and two or three thousand, it was likely, read the account in the paper. Have you any motion to make?

Mr Kane. At present I do not mean to trouble the court with any motion, but I do object to the whole of it as a publication calculated to prejudice the minds of those out of doors who may hereafter be called upon to sit as jurors on the other trials, nearly allied to that which now is occupying our attention. I do not attribute, in any degree, to the respectable editor of the paper in question, or to the gentleman who furnished him with the report, any intention whatever to frustrate the ends of justice, or to commit the mischief which the publication cannot but produce. He repeated, he had no motion to offer, but he trusted the observations he had dropped would produce a suspension for a day or two at least, of the determination which he gathered from a remark in the paper—that the report would be continued from day to day.

Judge BALDWIN said that the gentleman reporting the trial had behaved with much propriety. He had spoken to the bench

[United States v. Wilson and Porter.]

yesterday of his intention to publish the proceedings daily. The court neither forbade his doing so, nor sanctioned the application with their consent. He trusted however, that if the counsel for either of the prisoners saw, or thought they saw, any mischief in the proceeding, that their wishes would be attended to.

Mr Kane repeated his request—and the publication of the report in the papers was suspended until the conclusion of Porter's trial.

The trial now proceeded.

Samuel M'Crea re-examined. "I got the mail at the postoffice in Philadelphia that morning—both the leather and canvass were cut open—two of the mails I carried were cut open, two others were not. Two were in the front boot, and two behind; those in the fore boot were cut open.

Cross-examined by Mr Bradford.

Q. Had you any conversation with the robbers, and when?

A. Yes, when they were tying the passengers, one of them asked me, whether I didn't think it was rather a rough introduction, I told him I thought it was. He then asked me whether I made my living by stage driving, and I told him I did, and it was rather a hard life too, the way I was used. He said, This is the way we make our living, and it's hard with us sometimes.

Q. About what time in the morning was it when the mail was stopped?

A. The clock struck three about the time they were tying the gentlemen who were outside. It struck four before we left the ground.

Q. By Mr Kane. Which of the persons was it with whom you had this conversation?

A. I can't tell which 'twas. It was the one on the same side I was.

Q. Was it the one who had been all the time on the left hand side?

A. Yes.

Q. Did they walk about much?

A. The one who stood guard-like, walked up and down where they had the passengers in a row.

Q. Were the passengers standing up?

I.—M

[United States v. Wilson and Porter.]

A. Yes. I was on the right hand side of the stage, the person talking was on the left.

Q. How tall a man was he?

A. I took him to be a small light man, but I couldn't see him exactly, in the dark.

Q. By Mr Dallas. How far from the tollgate was this?

A. About a half a mile. It was just at Turner's Lane.

A witness was called to prove the confessions of the prisoner, to which Mr Kane objected on the ground of interest, a reward having been offered for the apprehension, to be paid on conviction; he also objected to any evidence of confession, unless it was in writing, or detailed in the words of the witness.

BY THE COURT. It is no objection to the competency of a witness that he may be entitled to a reward on conviction; public safety requires that rewards should be offered; and it has long been a settled rule of law, on grounds of public policy, that such an objection goes only to the credit of a witness. 1 M'Nally 61, 63, and cases cited. The evidence offered is to prove the admissions of the prisoner of the facts laid in the indictment, not to have the effect of a confession, but as a circumstance for the jury. Such admission need not be in writing, or in the words of the prisoner; the witness may relate the conversation as he recollects it. If it was in detached parts, relating to different subjects, he need state only what relates to the matter in issue. If the conversation was one unbroken chain, the whole must be given.

Abraham Poteet, on being called as a witness, was objected to on the ground of his conviction in the Baltimore city court of several offences, two of which were for larceny, of which the records were produced. Mr Dallas thereupon offered a pardon for the larcenies, granted by the governor of Maryland under the great seal of the state, which was objected to by the prisoners' counsel, who contended, that it must be shown that the person who signed the pardon was competent to grant it; that the constitution of the state conferred the power on the governor; that the act of pardon had passed through all the forms required by the laws of the state; that it had been judicially pleaded; and that the document must be proved in some mode prescribed by law, to make it admissible. In support of these posi-

[United States v. Wilson and Porter.]

tions they cited, 1 Story 93; 1 Burr's Trial 190; 4 Hawk. 55, 95; 4 Bac. Ab. 294; 1 Peters's C. C. Rep. 352.

BY THE COURT. The fourth article of the constitution of the United States makes the official acts of one state evidence in all others. The paper offered purports to be a pardon of the witness, granted by the governor of Maryland, under his signature and the great seal of that state. Every officer who certifies an official act, is presumed to be authorized to do the act he certifies. 4 Cranch 130. The great seal of a state proves itself; and all acts to which it is affixed are evidence in all the courts of the union: so are acts of foreign governments, certified under their great seal. 2 Cranch 238. The affixing the seal to a document, is evidence of its being done by the officer who has its legal custody, and the seal itself authenticates the act certified. 11 Wheat. 406, 407; 5 Peters 241. A book or pamphlet, purporting to be printed by the public printer, is good *prima facie* evidence of a public law. 4 Cranch 388. The objection must be overruled. (Vide NOTE at the end of the volume.)

The pardon having been read, Poteet, who was an accomplice, was sworn and examined. After he had given his evidence, he stated that he had stated the same facts to a justice of the peace in Baltimore; whereupon the counsel of the United States offered the justice to corroborate the evidence of Poteet, given at the trial, to which the prisoners' counsel objected.

BY THE COURT. The testimony of the witness has not been attached on account of the want of credit to his statement, or the manner in which he has related the transaction, which must be done before corroborating evidence can be received. His general credit as a witness, on account of the situation in which he stands, is open to the jury and the remarks of counsel for defendant; but till some attempt to impeach it on other grounds, evidence in support of his credit is inadmissible.

On the trial of Porter, a witness was called to testify to the confession of Wilson, his acts, and declarations accompanying his acts.

BY THE COURT. The confessions of Wilson being offered merely to prove his own guilt, are not evidence against Porter, unless it is

[United States v. Wilson and Porter.]

offered as the declaration of a confederate in the same crime, in which case it would be admissible on a joint trial against both. His acts are evidence which may conduce to prove the connection between him and Porter in the commission of the offence. As the district attorney waives the evidence of his declarations, we need give no opinion on their admissibility.

A witness, after being examined in chief, was called again to new matter not brought out by cross-examination, and objected to.

BY THE COURT. As a matter of right, the witness cannot be examined on new matter; it is however in the discretion of the court, which, in this case, we think it right to exercise by receiving the witness.

The trial of these cases was long and interesting. The prosecution was conducted with great ability by Mr Gilpin and Mr Dallas: the prisoners were defended with equal ability and great zeal; Wilson, by Mr V. L. Bradford and Mr J. K. Kane; Porter, by Mr J. C. Biddle and Mr J. R. Ingersoll. The questions of law being the same on both trials, Mr Biddle was heard upon them on the trial of Wilson.

As the arguments of counsel are contained in the pamphlet report of the cases, and as it would be difficult to separate the arguments on the questions of law from the view which counsel took of the evidence, they are not inserted in this report; they are sufficiently referred to in the charge of the court to explain the points of law on which the cases turned.

THE COURT (by Judge BALDWIN) delivered the following charge to the jury:

The prisoner on his trial before you is charged with a violation of the provisions of an act of congress for establishing and regulating the postoffice department, by robbing the carrier of the mail of the United States of the mail, and in effecting such robbery putting in jeopardy the life of the person having the charge thereof by the use of dangerous weapons.

The offence consists in robbing the carrier of the mail or other person entrusted therewith, of the mail or of part thereof; the question of law which comes first under your consideration is, what is a robbing of the carrier of the mail? The act of congress makes use

[United States v. Wilson and Porter.]

of the word "rob" without defining it; but it is a word which long before the act of congress had received a settled construction, by the common law both of this country and that from which we derive our legal institutions. "The stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party to part with the property unwillingly." This is the true meaning and the judicial exposition of what the ancient writers of the law declare to be robbery. The felonious taking from the person of another, money or goods of any value, by putting him in fear. Foster 128. It has been adopted by the supreme court as the sense in which the word robbery is used in the act of congress, United States v. Palmer, 3 Wheat. 630, and so it must be taken in this case as the rule of law by which you will inquire whether the carrier of the mail has been robbed.

You will perceive by this law that there are two species of robbery. 1. A robbery of the mail under such circumstances as amount to the offence by the principles of the common law. 2. A robbery effected by putting in jeopardy the life of the person having the custody of the mail, by the use of dangerous weapons. It is in these words. "Or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death." 3 Story 1992.

To constitute this offence, three things must concur: the mail must be robbed, it must be effected by putting in jeopardy the life of the person who has it in custody, and this must be done with dangerous weapons. On the first the court have given you their opinion of the law by which you ought to be governed. If a robbery has been committed, then the all important question arises—Was the life of the driver put in jeopardy? To judge correctly on this subject, our only safe rule is to be found in the law itself; the acts and words of the makers of our laws furnish the best evidence of their meaning and intention, and that, when ascertained, is the law itself. The first act of congress, which punished this offence, was passed in February 1792. By the seventeenth section it was punishable with death to rob the carrier of the mail of the United States of the mail—or robbing the mail of any letter or parcel, or stealing and taking from the mail or from any postoffice any letter or packet. 2 U. S. L. 251.

In 1794, a distinction was made between these offences: robbing

[United States v. Wilson and Porter.]

the carrier of the mail remained capital as before ; the other acts were punishable by fine and imprisonment only, according to the aggravation of the offence. 2 U. S. Laws 399, sect. 17.

In 1799 another law was passed, in the same words as the present, except that for the first offence of robbing the carrier of the mail, the punishment of forty stripes was added to ten years imprisonment, and the word "much" was inserted before the word "wound." 3 U. S. Laws 275.

The law of 1810 omitted the whipping and the word "much." The part of the law of 1825 which bears on the case of the prisoner, is a literal copy of the first part of the nineteenth section of that act. 4 U. S. Laws 297.

Thus it appears that this phrase, "or put his life in jeopardy," has been used in three different laws, the last passed twenty-six years after the first. It must have been well considered ; its legal meaning must have been well understood ; if it had been deemed at all ambiguous at first, it would have been superseded by some other expression in the subsequent acts of congress, but it seems to have been retained as a phrase better expressive of the intention of the law makers than any other which could have been substituted for it.

The meaning of this expression in the law of 1810 was settled in the circuit court of the United States for the district of Maryland and Pennsylvania in 1818, on the trial of the Hares and Alexander at Baltimore for robbing the mail, and of Wood in this place as an accessory. In the three first cases the court declared, "that robbing the carrier of the mail of the United States or other person entrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, such as pistols or dirks, putting him in fear of his life, and obtaining possession of the mail by such means, against the will of the carrier, is such a robbery of the mail and such a putting of the life of the carrier or other person entrusted therewith in jeopardy, as comes within the terms of the making the offence capital." The jury adopted this as the law ; found the prisoners guilty ; they were sentenced to death, and executed, except one, who received a pardon on the capital charge.

Wood was tried before this court as an accessory to this robbery ; and on his trial Judge Washington thus laid down the law to the jury. "As to the nature of the offence of which Joseph I. Hare was convicted (alluding to the Baltimore trials), the court does not

[United States v. Wilson and Porter.]

entertain a doubt; we think, that putting the mail carrier in fear, and his life in peril or danger, is putting his life in jeopardy within the meaning and intent of the act of congress; and if the jury should be of opinion, under the circumstances which attended this transaction, that Boyer (the driver) was put in fear or danger of his life, the offence of the prisoner was capital." So strong was the conviction on the mind of this humane and eminent judge that this was the law, that he so gave it in charge to the jury: though the district attorney was willing to abandon the capital charge, the jury agreed with the court, and convicted the prisoner capitally.

These cases are important, not only as affording a judicial construction of the law from which the present one is copied word for word, which is entitled to very great respect, especially in a court in which one of the judges who gave this construction presided so long and with such eminent public satisfaction and usefulness, but because congress have adopted and re-enacted the same expression of "put his life in jeopardy," after it has received a judicial exposition in two courts. There is no rule of law better settled than this; that where a word or a set of words has received a fixed and determined meaning, and is afterwards used in a law, it is with a reference to such meaning, as much so as if that meaning had been superadded as a definition. It is on this principle that the word rob and robbery is considered as defined by its mere use and adoption in a law. So if the word deed, will, bond, note, &c. as used in this same law, requires any explanation of what congress meant by their use, we must look to the common law for it. The word jeopardy was not for the first time seen in the act of 1825; it has been in use from the beginning of the government; it is in the fifth amendment of the constitution, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Its meaning was well understood to be the same as peril and danger, and it has been since used and expounded in the same sense. Vide 6 Serg. & Rawle 597.

But if this were a new question, we should entertain as little doubt about it as our predecessors have done. We think the intention of the law is manifestly apparent in the terms which are used, and the punishment affixed to the commission of the different offences therein enumerated, the first of which is robbery of the mail with no other circumstance attending it but such as constitutes the crime of robbery at common law, which is punishable with not less

[United States v. Wilson and Porter.]

than five or more than ten years' imprisonment for the first offence, and death for the second. You will observe that the robbery effected by putting the life of the carrier in jeopardy, is not a distinct offence, but a more aggravated species of mail robbery ; if it does not consist in putting the driver in fear, peril and danger of his life by the use of dangerous weapons, or the threat or offer to use them, then it must be necessary that some act should be done with dangerous weapons which does actually put his life in jeopardy, by a blow, a stab or shot, for there can be no middle kind of jeopardy, greater than the offer or threat to strike, stab or shoot, and less than the direct perpetration of either.

But this construction cannot avail the prisoner, for the wounding of the carrier is made an act, of itself, sufficient to bring the offence within the capital punishment. "Shall wound the person having the custody thereof"—this makes the offence complete ; "or shall put his life in jeopardy ;" this is a distinct act ; it need not be the mere wounding, for that case is fully provided for in the preceding sentence. Whether the wound is light or dangerous is immaterial, if done with a dangerous weapon ; for the term "much wound," as used in the law of 1799, was altered in 1810 and 1825, by omitting the word "*much*." So that a wounding which puts the life in jeopardy, forms no part of the description of the offence with which the prisoner is charged. This will, we think, be as clear to your minds as to ours, by examining that part of the law immediately following, which punishes the attempt to rob the mail, by assaulting the person having the custody thereof, by shooting at him, or his horse, or mule, or threatening him with dangerous weapons, by imprisonment not less than two, or more than ten years.

Stealing the mail is made a distinct offence, with the same punishment as the last. Cutting a mail bag, or doing the other acts enumerated in the twenty-third section of the same law, with intent to rob or steal the mail, are punishable by fine not exceeding 500 dollars, or three years' imprisonment. Here are four distinct offences. 1. Actually robbing the mail, of two species. 1. Robbery as defined at common law. 2. By putting the life of a driver in jeopardy. 3. Attempt to commit robbery by the assaulting the carrier, &c. 4. Stealing the mail. Cutting the bags, &c. with intent to rob or steal.

From this view of the act of congress, it is clear that it intended not only to make a difference between the different species of robbery, but the different modes of attempting or intending to commit it. If

[United States v. Wilson and Porter.]

by assaulting the driver, &c. the court may inflict as high a punishment as for actual robbery ; if by cutting open the mail bags, the punishment is limited to a fine of 500 dollars, or three years imprisonment—the circumstance which so highly aggravates the offence is the offer or threat or violence to the carrier or shooting at him, his horse or mule ; it is not in the mere attempt or intent to commit the felony.

No one could doubt that if the prisoner was indicted for attempting to rob the mail by assaulting the carrier, or threatening him with dangerous weapons, the evidence in this case, if believed by the jury, would bring him within the express words of the law.

Why shall we not apply the same rule to the commission as to the attempt to commit the offence ? Can it be credible that congress did not mean to discriminate between the mere robbery of the mail, and doing it attended with the use of deadly weapons by an assault on the person of the carrier, and threats of death in case of resistance ? The law itself furnishes a most decisive answer ; in the one case, it is imprisonment for the first offence, and death in the other, if life is put in jeopardy. In affixing this meaning to the word jeopardy, we differ from the defendant's counsel, principally as to the degree of danger, peril and hazard which it implies. They contend it must be extreme, imminent, and one of them, that there must be a struggle and personal conflict between the driver and the robber, in order to put life in danger. This principle can be easily settled by analogy to the case of homicide in self defence. A man may defend his life or person, when it is in danger, by taking the life of the assailant ; and it is not necessary that he should wait to receive a blow or shot, but may take the life before any injury is actually inflicted ; if the danger is impending, his life may be truly said to be put in jeopardy. If a man with a drawn pistol in his hand threaten to blow out his brains if he does not surrender his property, the one assailed may take the life of the other. The driver might in this case have taken the life of any of the robbers, and would have been perfectly justified in law in so doing, because his life was in danger. And if the driver was placed in such circumstances as justified taking life, his life was in jeopardy according to the true meaning of the act of congress.

It is a question of danger, and not of fear ; whether the driver had the iron nerves of the little Perry county witness, or was timid, is not material. Clark's life was as much in danger as any other pas-

[United States v. Wilson and Porter.]

senger ; and though he is a stranger to the feelings of fear, he would have been as much justified in killing the robber as any one who would do it under the influence of fear.

The court have no hesitation in saying to you, as matter of law, that such acts are putting life in peril, danger and jeopardy, within the express letter of the law, if you credit the testimony of the witnesses. If any one of you, driving a stage at the dead hour of night, should see three men suddenly rush upon you with drawn pistols ; one seize your horses, and two others approach you with such expressions as have been testified to you, would you not feel your life in jeopardy, when it was held at the mercy of a highway robber with his pistol at your breast ; and if you were thus compelled to part with property entrusted to your care, could you with truth say you had not been robbed by putting your life in imminent danger ? There is no magic in words, nor is law that mystical science whose words of art are enveloped in hidden meanings ; if jeopardy does not mean danger, peril, reasonable fear and well grounded apprehension, we are at a loss to give the word any definite meaning ; as used in the constitution, "jeopardy of life or limb," it can admit of no other interpretation than such as is mentioned ; so, we think, it is received and used in common acceptation ; so it has been judicially expounded, and, we think, adopted and used in the law.

If, therefore, you shall believe that a robbery of the mail has been committed by the prisoner ; and that in effecting it he has done such acts as created in the mind of the driver a well grounded apprehension of danger to his life, in case of resistance or refusing to give up the mail ; if his life was actually in danger, or he really believed it to be so, then the robbery was committed by putting his life in jeopardy. It is not necessary that the danger should exist at the moment of giving up the mail, if it ceased in consequence of the driver's submission from a reasonable fear of his life if he resisted or refused. The law implies that the fear continued during the whole transaction ; it was but one act ; one offence ; deriving its character from the circumstances attending its inception ; which was an attempt to commit a robbery by putting the life of the carrier in jeopardy, ending in the consummation by the same means. In applying the evidence to this part of the case, you will bear in mind that the prisoner is on trial for the robbery of the mail, not of the passengers ; the latter is not an offence within the jurisdiction of this court ; and that the subject of your inquiry is whether his life was put in peril.

[United States v. Wilson and Porter.]

The next question is, whether the robbery and putting in jeopardy the life of the driver was done with dangerous weapons ; pistols are such weapons ; it is a use of them to point them at another, accompanied with words which denote an intention of injury, or without words, if they are shown and so held as to plainly indicate a design to do so in case of resistance or refusal to consent to the objects intended to be effected by their production and display.

It need not be pointed at the driver, if intended to be used in case of resistance or refusal to surrender the mail ; or if it was seen by the driver, and he had reasonable cause for believing it was to be so used ; and it is not necessary that it be proved to have been charged, the presumption is that it was so until the contrary is proved. These are the words in which the law has been heretofore given in charge to a jury by our lamented predecessors, and we fully concur therein. "The law does not say that to constitute the crime the pistols shall be loaded, or a dirk be drawn from its sheath, we see no reason for giving to it such a construction. This presumption assumes the form of positive proof, the demand of the mail having been accompanied with a threat to blow out the brains of the carrier if he refused to deliver it, which could not have been effected unless the pistols were charged, and in all respects prepared to endanger life." 3 Wash. 442.

Our opinion then is, that in point of law the facts given in evidence in this case, if believed by the jury, do amount to the offence for which the prisoner is indicted ; if such should be likewise your opinion, you may find him guilty generally ; if, on the other hand, you shall believe that the prisoner has robbed the mail, but has not effected it by putting the life of the driver in jeopardy, or has not done so by the use of dangerous weapons, you will find him guilty of the robbery charged in the indictment, and not guilty of effecting it by the putting the life of the driver in jeopardy by dangerous weapons ; if you think there has been no robbery of the mail by the prisoner, you will find him not guilty generally.

We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case ; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court ; you may judge for yourselves, and if you should feel it your duty to differ from us, you

[United States v. Wilson and Porter.]

must find your verdict accordingly. At the same time, it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so: when the law is settled by a court, there is more certainty than when done by a jury, it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject—by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake.

These remarks apply to the expositions of the act of congress as made to you by the court; but if you are of opinion that the evidence in this case brings it within that act, or in other words, that in effecting the robbery of the mail the life of the driver was put in jeopardy, you have no discretion and no dispensing power, your oath makes the law your only guide to your verdict. You are not to look to its consequences or the punishment which may result; you only find that an offence has been committed, such as is defined in the law, and must be governed by the same rules of evidence, whether the punishment is death, fine or imprisonment. In all capital cases appeals are made to the feelings of jurors to induce them to be influenced by other considerations than such as grow out of the law and the evidence, but such appeals must be listened to with caution. It is for the national legislature to prescribe the punishment of offence; it is not for you or us to arraign their justice or wisdom, and in performing our respective duties in the administration of criminal justice, we must go in the safe road prescribed by the laws as their expounders, but without assuming the power to repeal, alter, dispense or annul their provisions. It is the most painful duty imposed on us to become the agents through whose judgment punishment must reach an offender, but we must in all cases meet it with an honest and firm purpose, to do justice between the public and the accused, by an even, steady course. We cannot vary in the rules of evidence, accordingly as they apply to offences of greater or lesser degree of atrocity—no man can be convicted unless on clear and satisfactory proof of guilt. If a jury have a reasonable, well founded doubt of guilt, they must acquit of even the lowest offences—we know of no

[United States v. Wilson and Porter.]

other rule for the highest. As to evidence, it must be the best the nature of the case and the ability of the party admits of, in cases of assault and battery; there can be no other rule in murder, unless it shall be required to prove the fact by some means of information more certain than human testimony. As to the law, it must meet the evidence and the case—whether it does so or not is for the court first and the jury afterwards to decide; but if it does, in their opinion, meet the case of the prisoner—obedience to the law is as much the duty of a citizen in the jury box as out of it. He violates every duty, if when his reason and judgment are entirely convinced of the guilt of the accused, he acts against such conviction from feelings of humanity, merely arising from the nature of the punishment; he does not, in the words of his oath, “a true verdict give according to the evidence.” The degree of punishment cannot alter the weight of the evidence or the meaning and words of the law; and a jury are bound to render their verdict according to these alone, be the crime or its punishment what it may. We have made these remarks not from any belief that they are necessary for this jury, but from the hope that hereafter our attention may be more confined to the true subjects of our inquiry, and less directed to matters which are exclusively for the cognizance of a tribunal to whom is entrusted the enactment of laws defining and punishing offences.

Our attention has been called to other questions of law which may affect the prisoner's case. It is contended by his counsel that the act of congress under which he is on trial, being highly penal, ought to be construed strictly. This is a rule of construction of statutes as old and well established as law itself, and must be always borne in mind by courts and juries. It is founded on the tenderness of the law for the rights of individuals, and on the plain and universal principle that the power of punishment is vested in the legislature, and not in the judicial department—it is the legislature and not the court which is to define a crime and ordain the punishment. 5 Wheat. 95, 96.

But though the penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute, so as to exclude cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. Their intention is to be collected from the words they employ. If there is no ambiguity

[United States v. Wilson and Porter.]

in the words, there is no room for construction. The court cannot depart from the plain meaning of a penal act of congress, in search of an intention the words do not suggest ; but it is not enough to authorize a conviction under it that the case comes within the mischief for reason of a law, it must come within its provisions, and be one of the enumerated cases for which it inflicts a punishment ; these are the rules settled by the supreme court, which we recommend for your adoption, as safe and unerring guides. It has been contended that inasmuch as Samuel M'Crea, from whom the mail is alleged to have been robbed, has not taken the oath directed by the second section of the postoffice law, the prisoners have committed no offence in robbing him of the mail ; but we cannot agree with the prisoner's counsel in this position ; the words of the law are, "if any person shall rob any driver of the mail of the United States, or other person entrusted therewith, of such mail ;" it does not say, who shall have taken the oath prescribed. We cannot think that because the oath has been omitted, it was the intention of the legislature that any person should be permitted to rob, steal and plunder the mail, letters and packets it contains, and put the life of the driver in jeopardy with impunity. If you are of opinion that M'Crea was a carrier of the mail, or entrusted with it, you ought to have no hesitation in saying that robbing him of the mail is the offence described in the law ; to say otherwise would be to repeal and nullify it.

Another position has been taken by the prisoner's counsel, and very strongly impressed upon the court ; it is this, that Wilson cannot be convicted on this indictment as a principal offender, unless he with his own hands committed the robbery, and put the driver's life in jeopardy by the use of dangerous weapons ; that the proof of all these acts must be brought home personally to him ; and that it is not sufficient if they were committed by Porter or Poteet in his presence, with his consent, direct aid and assistance. To support this position it is alleged, that by the postoffice law the offence of principal and accessory is distinct, punishable by different sections of the law, and that Wilson can be reached only by an indictment against him as accessory under the twenty-fourth section. It is certainly a correct legal principle, that an accessory cannot be convicted on an indictment against him as principal ; the offences are distinct, though the punishment may be the same, and so they are considered in this law—but it does not define what shall be the legal line of discrimination between the procuring of, advising or assisting in the doing

[United States v. Wilson and Porter.]

or perpetrating any of the enumerated acts or crimes forbidden by the law, and the actually doing or perpetrating them. The rules laid down as to the meaning and legal import of words used in laws must be applied to this; if they have acquired it by long usage, judicial exposition and common acceptance by legislative adoption, they must be presumed to be so intended, unless a different sense is affixed to them by the laws in which they are found. There are no words in the law which have so acquired a more definite and specific meaning, than procure, advise and assist, as contradistinguished from the actual commission of a crime—the latter is the principal offence, the former only accessory. If a person does no more than procure, advise or assist, he is only an accessory; but if he is present, consenting, aiding, procuring, advising or assisting, he is a principal, and must be indicted as such. A crime may consist of many acts, which must all be committed in order to complete the offence; but each person present consenting to the commission of the offence, and doing any one act which is either an ingredient in the crime, or immediately connected with or leading to its commission, is as much a principal as if he had with his own hand committed the whole offence.

You could not respect the laws of your country if they punished with less severity, or made any discrimination between the man who bound and held the victim and the one who gave a fatal blow—the robber who held the pistol to your breast, or the one who rifled your pockets—both are murderers, both are robbers, in the eye of the law, of reason and of justice. No principle can be better settled or ought to be maintained with more care than this. It would be in vain to pass laws for the prevention or punishment of crimes, if courts and juries were bound so to administer them as to require definite proof that a party accused committed every act necessary to bring them within the law, though it was manifest that it was the joint act of himself, and associates who took an active part in the actual perpetration: there is no such rule in our jurisprudence. The one contended for by the prisoner's counsel is only applicable to cases unknown to the United States. In England there are felonies which are punishable with death, unless the party accused are entitled to the benefit of clergy, which exempts them from that punishment—there are cases in which by the statutes of that country the party is deprived of this benefit—and these statutes are construed with extreme strictness out of tenderness towards human life. But this prin-

[United States v. Wilson and Porter.]

ciple is not applied to new created statutory felonies. They possess, in England, all the incidents which appertain to felony by the rules and principles of the common law, one of which is, that all those who are present, aiding and abetting when a felony is committed, are principals. This has never been questioned there; the principle has been adopted here, and has become one of universal application. 4 Burr. 2073, 2083; 12 Wheat. 460, 467.

That it fully meets the case now on trial, we have not a doubt, provided you believe the witnesses who have been examined. If Wilson was one of those who formed a plan of robbing the carrier of the mail, of the mail; if all were present; if each consented to the commission of the robbery, took any part in effecting it, or did any act tending to its commission, all are principals, and in an equal degree. It is wholly immaterial which held or stopped the horses, threatened the driver, held the pistol at him or took the mail from the boot, all the various acts in relation to the driver and the mail constituted the crime, of which each was as completely guilty as if he had effected it unassisted. Each one put the driver's life in jeopardy with dangerous weapons, whether they were used by himself or accomplice. It is hard to decide which took the most efficient part in the scene; the night was dark, and it was impossible for the driver or the passengers to identify which of the three committed the various specific acts which have been detailed. They were all unknown, and they took especial pains to conceal their persons from observation. The confessions of Wilson and the evidence of Poteet, if believed by you, fill every chasm in the testimony, which, in point of law, in our opinion, brings each of them within the express provisions of the law. But whether they are so in fact is your exclusive province to decide. Our duty ends on this part of the case by instructing you as to this law.

There are four questions for your consideration:

1. Was the carrier of the mail robbed of the mail at the time and place referred to?
2. Was it effected by putting the life of the driver in jeopardy?
3. Was it done with dangerous weapons?
4. Was it done by the prisoner, or by any of the others in his presence with his aid or assistance?

If you can with a safe conscience answer these questions in the affirmative, your duty is plain—to say so by your verdict of guilty.

[United States v. Wilson and Porter.]

If you have reasonable doubt you must acquit, but the doubt must be a real, honest one, whether the acts charged have been committed by the prisoner or in his presence and with his aid or consent. They must not be doubts about the policy, justice, or binding power of the law, or in any way growing out of the degree of punishment which may follow conviction.

In the case of Porter.

THE COURT (by Judge BALDWIN) charged the jury. He explained the law and recapitulated the evidence, as far as it applied, in much the same terms as those used in Wilson's case, and then proceeded :

These are the remarks made by the court in their charge to the jury in the case of Wilson. The course taken in this case makes it necessary to say something more. The robbery of the passengers is no offence against the laws of the United States of which this court has any jurisdiction—we cannot try, still less punish, this offence; it is within the exclusive jurisdiction of the courts of Pennsylvania, with which we claim no right to interfere.

But thus far it is a proper subject for your consideration in this case. Taking the whole transaction, from its commencement to the end, you must view it as one connected series of acts properly given in evidence, to enable you to decide on the matters directly under your consideration. As a part of the transaction, the robbery of the passengers is material, as tending to furnish evidence of the nature, character and design of the threats to the driver, the use of pistols, and the robbery of the mail. Thus far, and no further, will you consider it.

It is contended, that inasmuch as the indictment charges a robbery of the mail, the evidence must show that the whole mail must be robbed; that though robbing part of the mail is the same offence, yet the indictment not so laying the robbery, the defendant cannot be convicted. It is said that by mail, the law means all the bags then in the stage, containing letters, papers, or packets. We cannot assent to this proposition. By a mail is meant, a bag, valise, or portmanteau, used in the conveyance of letters, papers, packets, &c., by any person acting under the authority of the postmaster-general, from one postoffice to another; each bag so used, is a mail, of which there may be several in the same vehicle—as the way mail, the general, the letter, or the newspaper mail. We can conceive no

[United States v. Wilson and Porter.]

reason why the law should be construed otherwise. If a man should rob the carrier of the great southern, western or eastern mail bag, would it comport with common sense to say that because a small way mail bag had escaped the notice of the robber, he had not robbed the mail, and must go unpunished? Can you seriously believe that such was the intention of congress, or that the words they have used can justify the imputation to them of such consummate folly? If you do, then the crime of mail robbery may be expunged from the statute book; for the insignificant mail will always be left untouched. The court have no doubt that robbing the person entrusted with any one bag, valise or portmanteau, used for the purposes aforesaid, is a robbery within the express words of the law. Taking it from the driver's box, and throwing it into the road, cutting it open in the manner described, is robbery, if you believe the testimony.

The twenty-third section of the law punishes the cutting of a bag, &c., with intent to steal or rob even a newspaper; it would be truly a strange conception of the preceding section to say that a wholesale robbery of the bag and all its contents was no offence at all.

It is said there can be no jeopardy by the use of dangerous weapons till the pistol is discharged; but there is no danger to the driver if it is not directed at him; or with a ball in it, discharged at him without hitting him, or not in a dangerous or vital part; the loss of an arm or leg may not put life in imminent danger; if the discharge did not take effect, it would seem to us, that the danger is less, for then there is no jeopardy of life,—but before the discharge, he could not foretell the extent of danger—it might take effect. Why then the actual discharge of the pistols should be made the criterion of jeopardy, we are utterly at a loss to conceive.

In laying down a rule for the jury in Wilson's case, we stated that all who were present at the commission of an act, and assenting to it, were principals; we said that this was a rule of universal application; we repeat it now, and go further—it applies not only to crimes but to trespasses and contracts. When two or more persons act together, in pursuance of a common object, one is answerable for the acts of the other tending to effectuate their common object. If this rule is broken in upon, it will derange the law in many of its most important provisions. As it affects criminal jurisprudence, it would go far to operate as a general jail delivery. No case can illustrate it more thoroughly than the one before you. Who robbed the carrier of the mail?—who robbed him, by putting his life in jeopardy, by the use of dangerous weapons? The night was dark; the robbers

[United States v. Wilson and Porter.]

were unknown. Some one did one act, and some another; but each identical act was not done by one alone; there were three concerned, and no more, and the deed was done by them in conjunction. If the prisoner's counsel are correct then, from the nature of the case there can be no conviction of any one, for no one with his own hands committed the whole offence. The law becomes a dead letter; future prosecutions will become useless, if, where one holds the horses, a second puts the pistol to the driver's head, and the third takes the mail from the box, all and each are not guilty.

So, if we apply it to burglary, where one breaks open a dwelling-house in the night, another stands guard, and their comrades plunder it;—breaking and stealing make the crime. A did not break open the house; B did not plunder it; and C did neither—all must be acquitted. So, if one forges the plate of a bank note, and his associate the signature of the officers of the bank, and a third makes the paper, and a fourth strikes it off.

Are you prepared to establish this as a feature which is in future to distinguish our criminal code? If you are, we have only to say it is a new one, and must be introduced without our concurrence. You cannot apply one rule to the capital and another to the lesser offence; it must have a general application or it can have none. It is neither in your power nor ours to go further, as to the law of any case, than to decide upon what it was at the time the offence was committed.

Courts are mistaken often. It is the frailty of humanity to err, and we can claim no exemption; but you must remember that in all governments of laws there is some rule by which its citizens must be guided. The constitution entrusts the making of laws to the representatives of the people: they are often unwise, sometimes unjust, and public opinion calls for their repeal by the same body which enacts them; but, until they are so repealed, courts dare not, and juries ought not, to disregard them. In us it would be an impeachable offence; and though a jury could be punished by no law, their moral offence would be no less than ours.

The constitution and laws of the nation have entrusted this court with the power of expounding the statute, and declaring the common law applicable to all offences within its jurisdiction; and it has not been thought proper to give to the supreme court any authority to revise our decisions on any of the matters now in issue before you. If we agree, our judgment is final; if we differ, we can certify the

[United States v. Wilson and Porter.]

point of difference to the supreme court for their final determination. This is the only mode in which our errors can be corrected. We wish it were otherwise ordained, as it would relieve our minds from an awful responsibility; but we cannot shrink from it, when the duty is imposed on us under the highest obligations.

In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defence.

You may find a general verdict of guilty or not guilty, as you think proper, or may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply to the case.

But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court do not act, and cannot judge, there remaining nothing to act upon.

This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind, that it is a very old, sound and valuable maxim in law that the court answers to questions of law and the jury to facts. Every day's experience evinces the wisdom of this rule. In the case of Wilson, court and jury have passed on the questions of law, having no doubt of its embracing the case; we still adhere to our opinion, and cannot think otherwise. If this jury should differ from the former, can any man say what is the law of mail robbery as practically applied in this district? Where is the line which separates the guilty from the innocent in the transaction at Turner's Lane? Is it the one drawn by the court from judicial decision, legislative adoption, and, to their minds, contained in the very words of the law, the one drawn by the prisoner's counsel in the zeal of their noble struggle to save a client's life, or the one recommended to you as deducible from the verdicts

[United States v. Wilson and Porter.]

of juries in cases of murder, where the law and justice of the country may have been violated in obedience to supposed or prevalent public opinion.

This case has assumed an aspect which places you and us in a most interesting and responsible attitude before the public. We have stated our deliberate and decided opinion on the whole law of this case. There is no tribunal authorized by law to revise or correct our judgment ; not even the supreme court, on appeal or writ of error. Will you undertake to do what is forbidden to that high tribunal, which may decide questions arising between governments, but cannot decide this in any other event than our division of opinion?

If you will, it may subserve the purposes of the defence ; it may illustrate powerfully the humanity of the law in protecting prisoners from justice ; but are you convinced in your minds and judgments, that you will declare the settled pre-existing laws of the land ; that you will act on a rule which is a safe guide for the future, and better subserve the great purposes of public justice than what we have recommended ? If you indulge feelings of humanity, in construing acts of congress, decide whether it shall be humanity to robbers and felons, or to the innocent victims of their avarice or revenge—the carriers of the mail ; and whether you conscientiously believe that it was the intention of congress to protect, and save from the punishment prescribed by their own laws, the lives of atrocious offenders ; or to protect the lives of those whose public duty exposed them to danger from their attacks.

In a word, gentlemen, decide on the law and the facts as best comports with your sense of duty to the public and yourselves ; act on the same rule under which you would be guided as a magistrate or judge on the oath and responsibility of office. Then you will not err.

The court cannot but admire the efforts of intellect and eloquence made by the counsel for the prisoners. In going to the verge of their rights, in appealing from the court to the jury, they have acted in the strict line of their duty, from which they are under no obligation to depart ; but you will judge whether you will be equally within the line of your duties in sustaining this appeal, and sanctioning the doctrines urged upon you with all the exertions of strong minds, brought into action by warm hearts. In them to make the attempt is properly growing out of their professional situations ; but your position is wholly different. All we can say to you is, reflect,

[United States v. Wilson and Porter.]

deliberate, forget all appeals to your feelings, or any modes of operating on your judgment but such as are pointed out by the law or evidence.

On Thursday, May 6th, 1830, a motion was made by Mr V. L. Bradford, junior counsel for Wilson, based on the alleged admission of irrelevant and irregular evidence at the trial, for a new trial; which the court, after the hearing of argument from the counsel, overruled.

A motion was subsequently made for arrest of judgment in both cases, and reasons filed in support of such motion. The court was occupied several days in the arguments of counsel hereon. In overruling this motion the court entered at length into the reasons filed, and the arguments relied on by the prisoners' counsel.

Both prisoners were found guilty, whereupon motions for new trials were made and overruled; motions in arrest of judgment were then made.

Mr J. K. Kane.

1. The indictment is fatally defective, in not laying the offence to have been committed in a particular county in the district.

Every issuable fact must be set forth as committed in some village, hamlet or parish, as well as the county, so that a venire may issue to a jury of the vicinage. If the offence is laid in London, it is not sufficient without naming the parish, ward, &c. If laid in Guildhall, in London, it is not good. 1 Ch. C. L. 132, 196, 200. It is enough to prove the commission of the act in the county, but the indictment must refer to a special venire, from which the jury are to come. 4 Durnf. & East 490; 5 D. & E. 162; 1 Roll. Ab. 781; 2 Leach 800, 925; Archb. Cr. Pl. 12. If the facts stated are repugnant as to place or time, or are not stated, the defendant may demur or move in arrest. Yelv. 94; Cro. Eliz. 97, 98; Cro. Car. 525; 2 Hawk. Ch. 25, sect. 77; 2 Hale's P. C. 180; 4 Com. Dig., Ind. 670. There can be no intendment after verdict. Archb. 14; 5 D. & E. 162, 628. The indictment must show a certain place. 4 Maule & Selw. 215. The omission of the words "then and there" is fatal. 3 Johns. Cas. 265, 266; 1 Madd. 26; 2 Keb. 583; 1 Vent. 60; 12 Mod. 88, 502; 2 Str. 902. In capital cases the township, as well as county, must be laid. 7 Mass. 9, 13. So in misdemeanours, each

[United States v. Wilson and Porter.]

constituent of the offence must be laid with a special venire. 1 Johns. Rep. 66, 75.

The twenty-ninth section of the judiciary act directs that twelve jurors shall come from the county. 1 Story 63. The sixth amendment to the constitution directs that the trial shall be in a district designated by law, wherein the offence shall have been committed. This does not mean the general judicial district within which the court has jurisdiction, but the particular place or county from which the jury are to come. Hence the indictment must lay the county, so that the jury may be summoned thence, in analogy to the old rule in England, that four jurors, at least, must come from the parish, village or ward. Though this rule has become absolute in England, it is adopted by the twenty-ninth section, and the record must show that the trial was had in the county; or if that was inconvenient, that twelve of the jurors come from the county named. The venire is a special one, and forms part of the record. 1 Bl. Comm., App. 1. When no county is named, the clerk cannot make out the venire according to the act of congress, nor could we frame a plea to the jurisdiction, unless the county was named, for such plea must show what court could try the offence, and where it would be tried. 1 Ch. Cr. L. 298, 439. The forms of indictments show the law to be so. 4 Ch. 476, 505. The practice is to summon twelve jurors from the county where the crime is committed, and issue separate venires in each case. 2 Dall. 336, 343. A trial in the county is in the discretion of the court; 3 Dall. 513, 515; but the indictment must lay the particular place, county and district, and the venire goes accordingly. 1 Burr's Tr. 352, 430. So it was done in the cases of Wood and Alexander, in which Judge Washington said, there would be a propriety in laying the county. Mail Robbers' Trial 5, 6, 9, 196.

2. It must appear by the indictment that the weapons were dangerous. Here it is not stated that they were loaded. Though the presumption may be that they were so in fact, that does not supersede the necessity of the averment. Vide 3 Wash. 442.

4. The felonious intent of the prisoners, in putting the driver's life in jeopardy, does not appear; this is necessary, as in cases of treason, to show the intent in robbing the mail. 2 Dall. 357.

Mr Dallas, district attorney.

The time and place of the commission of an offence are immate-

[United States v. Wilson and Porter.]

rial, if they are so laid as to show the jurisdiction of the court. Though both time and place are specially laid, proof is sufficient of the act done at any time before the bill is found, and at any place within the district. 4 Com. Dig. 607. This indictment states the offence to have been committed in the eastern district of Pennsylvania, within the jurisdiction of the court, and while the mail was proceeding from Philadelphia to Reading. It is not necessary to state the subdivisions which the state or local authorities have made of the district designated by the act of congress. There is a necessity for laying the district in this court, to show that they have jurisdiction. So in England the county must be laid for the same reason. 1 Ch. 131, 94. But the township need not be laid, if it is not material to jurisdiction. 4 Bl. Comm. 306. Chief Justice Parsons gives the reasons why the county and parish must be laid in England, "because their limits are not prescribed by act of parliament, but depend on usage, of which the judges cannot judicially take notice;" and the rule does not apply where they are designated by law; hence it was held not necessary to lay the county, when the court judicially knew the township laid to be in the county. 7 Mass. 12.

In reference to the criminal jurisdiction of the United States, the constitution looks only to the district which is designated by law as the place of trial; it knows neither counties, townships, parishes, villas, &c. The twenty-ninth section is only directory to the marshal in summoning the jury. A prisoner can suggest the county where the offence was alleged to be committed, and apply for a trial there, as in the case cited, 3 Dall. 513, or may, at his option, waive the application. It is not a matter of right, but discretionary with the court, to direct the trial at any other than the ordinary place of its session. 3 Dall. 315. If, as a matter of fact, the defendant has been deprived of any right at the trial, it would have been a mistrial; but he has in fact been tried by a jury of the county. The summoning of twelve men from the county, as directed by the twenty-ninth section, cannot refer to the indictment, which is found after the venire issues. The venire does not name the jurors, the marshal must summon twelve out of the forty-eight or sixty, as the case may be, and return jurors from such parts of the district, from time to time, as the court shall direct, so as to secure an impartial trial; the residence of the jurors appears on the panel annexed to the venire, and if any defect of jurors appears, the court can award a tales.

In England the laying the vill, &c., has become absolute, as the

[United States v. Wilson and Porter.]

four jurors are no longer summoned from the place named. 1 Ch. 132, 196. When it ceased to be the law that the jury should be summoned *de vicineto*, and the statute directed they should come *de corpore comitatus*, from that time it becomes enough to allege a county for a venire. 3 Maule & Selw. 149.

The construction of the constitution of this state directing an impartial trial by a jury of the vicinage, has been that it means the county, and the supreme court thus held that it is sufficient if the indictment shows that the court have jurisdiction, and can give judgment for the offence; the court presumes that the sheriff knows, and will perform his duty, if not, they will set aside the jury process. 6 Binn. 185. It is not necessary to lay the township, though the penalty goes in part to the supervisors. 4 Serg. & Rawle 450. Though there is no venue laid, yet if the jurisdiction appears on the face of the indictment it is good. Cam. & Nor. 38; 3 Am. Dig. 170.

The cases referred to in this court, and the case of colonel Burr, were cases of treason, which are exceptions to the general rule, depending on the necessity of laying an overt act specially, and proving it as laid, 1 Burr's Trial 563, whereas, as a general rule, it is sufficient to charge the offence in the words of the law prescribing the punishment. 12 Wheat. 460.

Mr Joseph R. Ingersoll, in reply.

The prisoners have had a fair and impartial trial, but if there had been a mistrial, it would be a good ground to arrest the judgment. Cro. Jac. 284. There is greater reason for laying the locality of an offence in indictments in the federal courts, than in England, or the state courts, because many of the districts are as large as an European sovereignty.

Laying the county is sufficient, as they are small; but from this indictment the court cannot know in what county the offence was committed: there are four counties between Philadelphia and Reading, and there are no jurors from the county of Berks; the defence is negative; if it turned on an *alibi*, the county might be very important, and therefore it should be referred to in the record. The court cannot look to the evidence, if the indictment does not show jurisdiction, and give notice of every matter necessary for them to act upon at the trial, or in giving the proper directions preceding it. 2 Hawk. Ch. 25. It must contain every requisite prescribed by the law, on

[United States v. Wilson and Porter.]

the same principle which applies to the civil jurisdiction of the courts of the United States. The first proceeding is the indictment, the venire follows, or a distringas and a tales; but as twelve jurors must come from the county, it can only be ascertained from the indictment; as the prisoner is presumed innocent, he is not to name the county where the offence was committed.

The panel shows where the jurors come from; the indictment shows where he is charged with committing the offence; the prisoner then knows whom to challenge; but if there is no venire, his right of challenge is impaired. At common law, the going to trial, in an action of trover, was no waiver of the want of a venire in the declaration; Cro. Eliz. 78; and in criminal cases there must be an express waiver of the right to a local jury, or it remains. 2 Hale's P. C. 193; 3 Mass. Rep. 133.

Though the present is not a question of jurisdiction, it is an important one. In England the indictment lays the county to show jurisdiction, and as the general vicinage from which all the jurors must come; the villa, parish, &c., are laid to ascertain the particular place from which four are to be summoned; 1 Ch. 196 § Thomas's Co. Litt. 505 (Hargrave's note); the want of which is not mere form, but is good cause of challenge at the trial, and a mistrial, for which judgment will be arrested. Co. Litt. 125, a. Defects in venires are cured in civil cases, by 4 Ann. Ch. 16, sect. 6, but felonies are excepted by the seventh section, 4 Ruff. 206; before this statute the consent of parties to an ejectment did not cure a defect in the venire. Hob. 5, 89; Cro. Eliz. 260. In New York, where the offence is laid in the city, the ward must be named. 7 Cow. 430. So must a parish be (by the note of the reporter), or the judgment will be arrested; and in England, though the statute 7 Geo. 4 has provided that the judgment shall not be staid on an indictment for such defect, where the court has jurisdiction, it may be still taken advantage of on demurrer, according to Carrington, Cr. Law 44, 57.

In civil suits it is enough to lay the venue in the county, where it is in a superior court of general jurisdiction; where the court has only a special jurisdiction, the place where the cause of action arose, must be specially laid so that jurisdiction will appear. 1 Ch. Pl. 280. When a jury are to be summoned from a particular vicinage, it must be laid. 3 Maule & Selw. 148. Where an indictment laid the offence at the parish of St Mary, in the county of M., and there

[United States v. Wilson and Porter.]

was no such parish, Lawrence, J. saved the point. 3 Camp. 77. The common law is in force in the circuit courts, as to the forms of indictments and pleadings, challenges to jurors, &c. 1 Gall. 494. Any defect in an indictment, or in the mode of setting out the offence, is fatal. 4 Ch. 44, 46 ; 2 Hawk. 185. Judgment will be arrested if there is no venire. 18 Johns. R. 212 ; 1 Wend. 117. So if the time of the offence is not stated. 9 Cow. 660. The time is not essential unless in special cases, as in the assignment of perjury. 1 Gall. 387.

The cases in this court on indictments for treason and mail robbery, and the case of colonel Burr, are conclusive on the point.

The opinion of the Court was delivered by BALDWIN, J.

The counsel for the defendant has filed the following reasons in arrest of judgment.

"1. That it does not appear in the indictment in what county the offence charged therein was committed.

"2. That it does not appear with certainty in the indictment that the weapons therein charged to have been used by the prisoner, were dangerous weapons, inasmuch as it does not appear that the weapons therein set forth, viz., pistols, were loaded.

"3. That the offence charged against the prisoner is not so described in the indictment as to make it certain, by reference to the statute of the United States, that judgment of death should pass against him.

"4. That it does not appear by the indictment that the intent of the prisoner was felonious in the putting of the driver's life in jeopardy.

"5. That the indictment is in many other respects defective and erroneous."

Having laid down the law to the jury, that it was not necessary to prove that the pistols were loaded, and that their use in the manner testified brought the case of both prisoners within the act of congress, the court has already decided on the second and fourth assigned reasons in arrest of judgment ; we have no doubts as to the entire correctness of the opinion, and deem it unnecessary to repeat the reasons there given or to assign any new new ones, as the shape in which they are now presented does not vary their legal bearing.

The third and fifth are fully answered, in our opinion on the first.

The remaining exception to the indictment is one on which the

[United States v. Wilson and Porter.]

court have bestowed their most serious and deliberate attention. In a capital case we would not pass sentence on a prisoner, where we entertained any doubts of his case coming within the law which inflicted the punishment, or of the sufficiency of the indictment on which he had been tried; we must be satisfied that he is guilty not only in substance and form as he is indicted, but that he is indicted according to the mode and in the manner prescribed by law. *United States v. Gooding*, 12 Wheaton 474.

At the common law great nicety is necessary in the description of offences, and especially of capital ones. The rules which regulate this subject have, in former cases, been founded on considerations which no longer exist in our own, or English jurisprudence; but being once established, they still prevail, although if the case was new, they might not be incorporated into the law. But before we could be justified in declaring a rule of the common law of England, which was founded in no reason, or in such as was no longer operative there and was never applicable here, to be a part of the common law of the United States binding on this court, we ought to be well convinced that it has been adopted in the states before the organization of the federal government, or by the courts which have been brought into action under it. We should be the more cautious in giving way to an objection to an indictment which is founded in mere form, in a case where the words of an act of congress, defining and punishing an offence had been pursued, when it appeared to have been committed within the jurisdiction of the court, and when any further particularity would be of no possible benefit to the prisoner, or the result of it in any possible manner deprive him of the means of information necessary for a full defence. There are certain principles by which we must be governed in judging of the sufficiency of all indictments. They must contain a legal description of an offence, laid with such locality as to enable the court to judge, on the face of it, that they have power to punish for its commission. It is our duty to see that these requisites are complied with, as constitutional and legal provisions which we must obey. When, however, we are called upon to prescribe additional ones, we must find them in some law which controls us, before we can refuse to render judgment on a verdict which has been rendered on a fair trial, on clear undoubted testimony and when the record contains all the form and substance required by any statutory provisions or decisions of any court acting under our laws.

[United States v. Wilson and Porter.]

The only clauses on this subject to be found in the constitution are in the 3d section of the 8th article, declaring that all trials for crimes shall be in the state where the offence shall have been committed, and in the 6th amendment which says, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The only act of congress which can be relied on is the 29th section of the judiciary act, which provides :

"That in cases punishable with death, the trial shall be had in the county where the offence was committed ; or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence."

All these requisites have been complied with. The trial has been in the state, in a district previously ascertained by law, in the county where the offence was committed, from which twelve at least of the petit jurors have been summoned. The indictment alleges the offence in the words of the act of congress—charges on the prisoners the robbery of the carrier of the mail, proceeding from Philadelphia to Reading—to have been committed within the eastern district of Pennsylvania, and within the jurisdiction of this court. These facts being found true by the jury, give judicial knowledge that an offence has been committed, which is punishable by law, as well as at the place over which we have jurisdiction and power to try consistently with the constitution and amendment.

We are bound to try all crimes committed within the district which are duly presented before us, but not to try them in the county where committed ; that is a matter of which the court must judge in the exercise of their discretion, 2 Mason 95, 96, 99, which does not require to be guided by the averments in the indictment. If the law was imperative that the trial must be in the county, the reasons might be very strong, and even conclusive, for requiring the county to be named ; but being discretionary in the court, there would seem to be no necessity for the averment, as they had other means of knowing the place of the offence, which need be noticed only to direct their discretion, but not to give them power to try. When that is apparent from the record, and every legal requisition is met, we must inquire if there have been any superadded by judicial authority. In the reports of cases in federal courts we find no decision that an indictment

[United States v. Wilson and Porter.]

for capital crimes against the laws of the United States must lay the county in which it is committed. In the case of Wood, for mail robbery, the objection was mentioned, but Judge Washington did not arrest the judgment on that ground, or give any opinion whether it was a fatal one or not. He contented himself with observing that there was a propriety in naming the county, in which we fully concur with him. But although there is always a propriety in avoiding any questions which the ingenuity of counsel may raise, it by no means follows that the averment was necessary in his opinion.

This appears to be the only case in which the question raised before us has been distinctly proposed before any court of the United States, but there are others in which principles very strongly analogous have arisen and been settled.

The third section of the act of the 30th of April 1790 affixes the punishment of death to any crime of murder committed in any fort or place under the exclusive jurisdiction of the United States. One Connell was indicted for the murder of William Kane in fort Adams, in Newport harbour, which was alleged to be a place within the sole and exclusive jurisdiction of the United States. He was convicted, and sentenced to be executed.

The principal question was as to the jurisdiction of the court. In order to give it, the murder must have been committed within the exclusive jurisdiction of the United States. It was so considered by Judge Story both in his charge to the jury and in overruling the motion for a new trial. It does not appear that the act was charged to have been done in the county of Newport; indeed it could not have been so, for this learned judge declares, that "strictly speaking, it was not within the body of any county of Rhode Island, for the state had no jurisdiction there." It could not then have been necessary to have so laid it; yet the trial seems to have proceeded according to the provisions of the twenty-ninth section of the judiciary act. Sixteen jurors were summoned from the county of Newport, and the various points growing out of that act were fully considered by the court. Though they gave no direct opinion on the question now under consideration, they gave a judgment in a case where the record must have directly presented it. It seemed sufficient that the case came within their jurisdiction by the commission of the crime within a fort, and so laid.

This case is also an authority in answer to the arguments in favour of this objection drawn from the twenty-ninth section, that as twelve

[United States v. Wilson and Porter.]

jurors must be summoned from the county, it must be alleged in the indictment, as a guide for the venire. In that case the prisoner's counsel urged that the venire could not issue till the prisoner had pleaded. The court instantly overruled the objection as forming no part of the issue before the jury: as also the one taken on the ground that the trial ought to have been had in the county of Newport, and for the same reasons. If then the commission of the offence in the county formed no part of the issue, it clearly follows that it would not be a material averment in the indictment, the court having jurisdiction without it.

In general, it is sufficient if the indictment sets forth an offence in the words of the statute creating it, or as defined at common law, without the particulars of the manner or means, place or circumstance. "The case of treason stands upon a peculiar ground; there the overt acts must by statute be specially laid, and must be proved as laid." *United States v. Gooding*, 12 Wheat. 473, 475.

It is evident that the law was so considered by the chief justice on the trial of colonel Burr. He observes: "in considering this point the court is first led to inquire whether an indictment for levying war must specify one overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance. The place in which the crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defence."

It was held in that case to be necessary to lay the particular manner in which the war was levied; "that an overt act must be averred and proved at the place alleged in the indictment, no other overt act can be inquired into except for the purpose of proving the particular fact charged, it is as evidence of the crime consisting of this particular fact, not as establishing the great crime by a distinct fact. The overt act charged is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties."

These are rules of the law of treason in levying war both in England by their statute, and in the United States by the act of the 30th of April 1790, which has this expression in the section punishing treason: "and shall be thereof convicted by confession in open court, or on the testimony of two witnesses to the same overt act, of the treason whereof he or they shall stand indicted," following

[United States v. Wilson and Porter.]

mostly the words of the third section of the third article of the constitution.

The requiring the overt act of levying war to be specially laid, is an exception to the general laws of treason in England, growing out of the statute of Edward III., which directs it as to this species of treason; but as to that which consists in counterfeiting the coin, does not require it, and it need not be laid. The same rule must apply to the constitution and act of congress, as treason consists only in levying war, and is the only crime in our code which must be proved by the commission of the specific act, in the manner, place and circumstances as charged in the indictment.

The act of congress on the subject of trial in the county, and the summoning of jurors, can have no bearing on the forms of this indictment, for the place of trial is discretionary with the court, and by the uniform practice in Pennsylvania, before the passage of the judiciary act, and of this court ever since, the venire issues before the indictment is found. The jury cannot take these matters into their consideration, as they form no part of the issue of guilty or not guilty; they cannot inquire into the sufficiency of the reasons which induced the court to refuse a trial in the county, or whence the jurors come; these are matters which the court will so regulate as to do justice to the prisoner on any objections made by him to the panel, but they cannot in any manner affect the indictment, which is presented after the jury are summoned, and cannot of course serve as a guide to the marshal in executing the venire. If he shall not have summoned the requisite number from the county, and the prisoner insists on his right, the court may continue the cause, or direct a return of the proper number from such county or part of the district as shall be most favourable to an impartial trial. This part of the twenty-ninth section of the judiciary act fully meets every exigency which may arise at the trial, and in our opinion furnishes a very satisfactory answer to all the arguments which are founded on the preceding provisions contained in that section.

The case of the People v. Bennet and Wood, 1 Johns. Rep. 66, does not sustain the position assumed. It was decided in that case that the offence must be laid in the county, not that it must be laid in the township. The true reason for the judgment of the court was assigned by justice Spencer, "it did not appear that the essence of the offence was committed in the county," and leaves the present question untouched; for the county, in a state court, means no more

[United States v. Wilson and Porter.]

than state or district in this; which is, that it must appear to be within their respective jurisdiction.

The one from Massachusetts seems to us to be more in direct opposition to the principle asserted. It was decided in that case that an indictment for not repairing a road was good, although it did not lay the offence to be in the county; it was held to be sufficient to say the township, because, as judges, they knew from the several public statutes of the state that the township of Springfield lay wholly in the county of Hampshire.

The eminent judge (Parsons) who delivered the opinion of the court, declared that "the objection by the common law of England might prevail, because the judges cannot presume that the whole of the township or parish lies in the same county. In England the limits of the several townships and parishes are not ascertained by public acts of parliament, the records of which are remaining, but are determined by ancient usage, of which the judges cannot judicially take notice. The case is different in Massachusetts: our county limits are prescribed by public statutes, of which we are bound judicially to take notice." 7 Mass. Rep. 9, 12.

In referring to the law of Pennsylvania, as it was at the time of the passage of the judiciary act, we find that robbery was a capital offence: the punishment was altered in 1790, but the laws as to the form of the indictment did not change with the change of punishment. The act of assembly of 1777 adopted so much of the common law of England as had heretofore been in force in the province; 1 Dall. St. Laws 723; but that part of it which relates to this question does not appear to have been in force before the revolution, but a different rule must have prevailed. From the early periods of our judicial history, the uniform practice in the criminal courts has been to lay the county, and not the township. Such are the forms yet in use in cases of murder. The only reported case to be found in which an objection was made that the township was not alleged, was in the Commonwealth v. Duncan, on an indictment for adultery. It was said to be necessary, because the fine was to be divided between the commonwealth and the supervisors of the township in which the defendant resided, according to the provisions of the law punishing the crime. The court held it "not necessary, because they could ascertain the place of the defendant's residence otherwise than by the verdict of a jury." 4 Serg. & Rawle 450.

If there was any case in which there could be reason for laying

[United States v. Wilson and Porter.]

the township, it was this ; but it has never been decided in Pennsylvania that it was necessary in any. The practical construction of that part of the constitution requiring a trial of all offences by a jury of the vicinage, has been, that it is fully complied with by a trial by a jury of the county.

We have then, in this case, the authority of the supreme court of Pennsylvania added to all that has been referred to, and, on a deliberate consideration of the subject, are clearly of opinion that the objection taken to the indictment in these cases cannot be sustained. If we entertained a doubt, we would certify the case to the supreme court ; but feeling none, it is our duty not to delay public justice. We have carefully reviewed all the proceedings on the trials, and can find nothing, in our opinion, in the least erroneous. Had we doubted in the least the correctness of our decision on any point which arose, we would have given the prisoners an opportunity of another trial ; but we have had none.

The evidence was clear, uncontradicted and conclusive. The guilt of the prisoners was apparent, and ascertained after a long, laborious and impartial trial, in which they were defended with all possible ability and exertion. The jury was satisfied on all questions of fact ; we are equally so on those of law, arising on the trial or apparent on the record, and therefore overrule the motion in arrest of judgment.

HALL V. PEROTT AND CABOT.

If a special jury list has been struck by the parties before the marshal, and the list has been lost by him, so that no venire had issued, the court will direct the striking anew from the same list, and a venire to issue returnable ten days thereafter during the term.

THIS case was marked for trial by special jury, under a rule for trial or non pros. at the present term, and a list of the special jurors had been made out and regularly struck before the marshal, but was lost by accident before it was returned to the office of the clerk, so that no venire issued. On a copy of the same list of jurors which had been struck being found, Mr C. J. Ingersoll, for the defendant, moved for and obtained a rule to show cause why the list should not be struck, and a venire issued, returnable during the term. On the argument of the rule,

Mr C. J. Ingersoll, for defendant.

Under the rule for trial, or non pros., the defendant has a right to a trial at this term, unless the plaintiff assigns a legal reason for continuance. The loss of the struck list was an accident by which the court will not permit him to suffer, when a remedy is in their power. By the twenty-ninth section of the judiciary act, jurors may be returned from time to time as occasion requires. 1 Story 63. The thirty-second section gives the court unlimited power to make such amendments, and cures such defects of process as to meet the justice of the case. Here a jury had been struck by both parties, the list whereof the marshal was bound to return to the clerk, for a venire to issue pursuant to the state law providing for special juries, which was adopted by the act of 1802. 2 Story 862. The act of 1785 gave either party a right to trial by special jury, and ordered those not struck to be summoned. 2 Dall. Laws 267, sect. 17. The mode of striking therein prescribed was complied with, which gave the parties a right to have the jurors before the court; no venire is necessary, a summons to the juror is sufficient. 3 Black. Comm. 353; Troubat & Haly 172, 176. The want of a venire is cured by verdict. Cro. Eliz. 259, 429. Where one is required, a venire facias de novo will be awarded where the former one is defective. Cro.

[Hall v. Perott and Cabot.]

Jac. 670. Defects in the venire are amenable by the statute of Jeofails; Tr. P. P. 63, 74; 1 Bac. Ab. 99; Tidd's Prac. 277; Selw. N. P. 432, introd. 68.

The only use of a venire is as a writ to the sheriff to summon a jury; but under the state law, the jurors are summoned before the venire issues; it is a mere matter of form; if jurors do not attend, the court may fine them, and may, in all cases where there is no jury, direct a tales; 1 Story 64, sect. 29; as well of special jurors as others. 2 Dall. 382. It is enough if one juror attend. Cro. Jac. 316. If none attend, a habeas corpora juratorum with a decern tales is awarded. Cro. Eliz. 502. If when the tales is awarded, the panel stands, but is afterwards quashed, the tales may be for the whole jury. 10 Co. 102, *b*, 104, *b*. In this case some, if not all the jurors do attend, and the court may direct them to serve. A venire, if necessary, may be returnable during the term. The court may adjourn from time to time, till the next term. In England the venire is not of course returnable on any return day, but is at the discretion of the court. So it was held in this court in Lushington v. Smith the marshal, in 1816, where the venire and return were set aside on motion, and a venire facias de novo directed, returnable during the term. Since the repeal of the eighteenth section of the state law of 1785, the time of striking a jury is a matter to be regulated only by practice, a rule of court, or according to its discretion.

Mr Lowber and Mr Chauncey, for the plaintiff.

A venire is requisite by the acts of congress; 1 Story 63; and by the law of the state. Purdon 437. The jurors must appear in pursuance thereof, or the court cannot try the cause for the want of jurisdiction; if no juror so appears, there can be no tales awarded, because "non sunt qualis." 10 Co. 104, *b*. Though a defective venire or its defective execution is amendable, there can be no amendment in this case, as there is nothing to amend, and nothing to amend by; there is no precedent for what is now asked. In Lushington v. Smith, there was a venire returned, the jurors attended; when it was set aside, an order was granted for a new one, but it never issued, and as it does not appear that the matter was argued or opposed, it may have been by consent.

In case of a special jury the venire issues for the twenty-four not struck off, but here none can issue for the names are not known, nor can the court amend so as to supply what is lost by accident, or put

[Hall v. Perett and Cabot.]

on record a writ which never issued ; the variance of one name would be fatal, and the court cannot order the plaintiff to strike ; it must be done according to the rules of court. The twenty-ninth section must be construed with reference to the state laws then in force ; the word " occasion " refers to the regular session of the court for the trial of issues, not at special sessions to be directed by them. The process act, 1 Story 257, adopts the forms of writs and process used in the states, which the federal courts must follow as a limitation of their powers.

By the laws of the state there are certain return days for all process. 1 Dall. Laws 171 ; 3 Dall. Laws 769. Venires are made returnable to the first day of the term ; 2 Dall. Laws 262, &c. ; the seventeenth section, which adopted the English practice then prevailing as to the striking special juries, directs them " to be summoned as aforesaid," which means by a venire so returnable on a general return day. Tidd's Prac. 839. A *distringas*, or *habeas corpus juratorum*, never issues for trials at bar ; the jury are always called by the appropriate writ, returnable the first day of the term, or on the last return day. 3 Bl. Comm. 353, 354 ; Tidd's Prac. 836 ; Salk. 454 ; 2 L. R. 1143. As there is no act of congress to authorize the court to make special return days, they must be governed by the practice prevailing in 1789 ; 1 Pet. C. C. 1 ; and cannot direct special returns of jury process. 3 Dall. 17, 18, 513. Whenever the law refers to a return of process, it means the general return days. When the venire goes, the party has a right of trial by jurors not expunged at the striking according to the rule ; the court can enforce no other mode than what it has prescribed ; of course there can be no new striking during the term. The old state practice was to have a venire in each case ; now a general venire issues, but the forms are the same ; they are returnable on the general return day. Graydon's Forms 314, 315. It is a writ directed to the sheriff before the term, which the court cannot direct to be filed as a matter of form, as a *feri facias* to ground a testatum ; 2 Dall. 269 ; or a venire to ground a *distringas* ; 4 Yeates 185. The common law gives no discretion to the court to make special returns ; nor does the twenty-ninth section, which gives a discretion only as to the place whence the jury shall come, in order to secure an impartial trial. The application now made is in effect to ask the court to appoint a special session for the trial of the cause, which the court cannot do ; this power is applied to criminal cases only. 1 Story 54, 55.

[Hall v. Perott and Cabot.]

The opinion of the Court was delivered by BALDWIN, J.

By the twenty-ninth section of the judiciary act, jurors in all cases to serve in the courts of the United States, shall be designated and formed according to the laws of the states, so far as is practicable. Special juries were accordingly selected by the clerk till the act of 1802 transferred this power to the marshal, who was directed thereby, "to return special juries in the same manner and form as by the laws of the respective states the said clerks were required to return the same. 2 Story 862. By this act the whole duties of the clerk in relation to special jurors, were devolved on the marshal, including the return.

By the seventeenth section of the jury law of this state, passed in 1785, either party in a civil suit might enter a rule for trial by special jury, to be struck before the clerk of the court, "in such manner as special juries have heretofore been struck, which jury so struck shall be summoned in manner aforesaid, and shall attend and serve under such penalties," &c. By a proviso in the eighteenth section it was required that the jury should be struck thirty days before the return day of the process for summoning them; the service of a copy of the rule for a special jury, and a copy of the list of jurors, and notice to attend the striking, was also directed. 2 Dall. Laws 267, 268. This section was repealed by the act of March 1789; 2 Dall. 691; by the same law the right of a defendant to a special jury in the supreme court or at nisi prius, was confined to cases where the title to real estate was in question, or an affidavit of defence filed. The seventeenth section of the act of 1785 is therefore no longer controlled by the proviso, and furnishes the rule by which special juries were to be designated and formed at the passage of the judiciary act; it also remains the rule under the act of 1802, as no state law intervened. The state law of 1805, relating to juries, is a process act, not binding on the federal courts, unless it has been adopted by a rule of court. 10 Wheat. 20, 51, &c. The rule of this court is silent on this subject; we must therefore be governed by the law of 1785. They are to be struck as they have "heretofore been struck," that is, according to the English practice and the statutes; 3 Geo. 2; 6 Ruff. 25, &c., &c.; 24 Geo. 2; 7 Ruff. 327; except so far as it is altered by the repealing act of 1789. In the common pleas, a rule for trial by special jury was of course; Barnes's Notes 449, 61, 88; 5 D. & E. 464; (now it is discretionary;) 4 Taunt. 471. In the king's bench, it was discretionary, on cause shown; Styles 477; 8 Mod. 248;

[Hall v. Perott and Cabot.]

2 L. R. 1364 ; And. 52 ; 2 Lill. Pr. R. 154, 155 ; Complete Juryman 66. It could be entered at the term at which a cause was for trial at the sittings, if entered before the return of the venire facias ; Barnes 488 ; Tidd's Prac. 844—6. The facility of attaining the rule, and the delay attending it led to a rule of the king's bench in 1808, and the common pleas in 1812, limiting the time within which it should be applied for. 10 East 1 ; 4 Taunt. 600. In this state the right was restricted by the act of 1789. In the eighth section of the stat. Geo. 2, prescribing the mode of summoning juries, special juries are excepted, 6 Ruff. 27, so that the method of proceeding by special juries is in no respect altered, 5 D. & E. 463, cited. The same exception is made in the act of 1785, sect. 4, 5, 6 ; 2 Dall. Laws 263.

The seventeenth section merely directs that the jury "shall be summoned as aforesaid ;" which, by the eighth section, is directed to be ten days before the return of the writ or process. The twentieth section authorizes the imposition of a fine for non attendance.

A venire is but as a summons to the jury, Dalt. Sh. 160 ; where for a special jury it is a special writ, 2 Lill. Pr. Reg. 779, returnable at the discretion of the court. 2 Tidd. 844. No time is fixed for the service of the summons ; in Sayer 31, Foster, J. thought it ought to be six days ; it must be a sufficient time to allow them to appear at the trial. Sayer 31. The court may direct a trial in term time. 4 Taunt. 471.

The repeal of the eighteenth section of the act of 1785 has removed the restriction as to the time of striking a special jury. By the twenty-ninth section of the judiciary act, juries may be "returned as there may be occasion for them, from time to time ;" and the court may award tales to supply the defect of jurors. This act has been held to apply to special jurors in this court ; 2 Dall. 382 ; the same construction has been put on the act of 1785 by the courts of the state. 2 Yeates 133 ; 4 Yeates 236. There is nothing therefore to control the discretion of this court ; the mode and time of striking, and the return of the venire, are matters of practice regulated by rules ; the rule of this court directs that no venire shall issue unless the jury is struck ten days before the return, and the handing the jury list to the clerk at the proper time, entitles either party to have a venire for the names not expunged.

In this case the jury was regularly struck. It was the duty of the marshal by the act of 1802 to summon and return the jurors not ex-

[Hall v. Perott and Cabot.]

punged ; a venire was a matter of course by the common law, and of right by our rule ; the defendant had a right of trial at this term under his rule to try, or non pros. He will be deprived of it by an accident, for which he is not responsible, if we refuse to make the rule absolute. We cannot doubt our power or the justice of its exercise ; a copy of the general list is found and proved to contain the same names as in the list which was struck. No injustice is done the plaintiff by directing a new striking, on reasonable notice ; and our rules are complied with by directing a venire to issue returnable ten days thereafter.

Rule made absolute.

HARMAN V. HARMAN.

On a decree of distribution it was ordered by this court that the complainants, residing in France, should give refunding bonds with security, pursuant to the act of 1794, concerning intestate estates.

Bonds executed here, in virtue of a power of attorney executed in France before a notary, according to the law of that country, but not under the seal of the complainants, were held not to be such as were required by the law of this state.

The seal of a party is necessary to give a paper the effect of a bond in preventing the bar of the act of limitation, and giving it priority as a specialty in paying the debts of a decedent.

BY a former decree in this case the court had directed refunding bonds to be given by the complainants, who resided in France. They executed a power of attorney, before a notary in France, according to the forms of the civil law, authorizing their agents here to execute bonds pursuant to the order of the court; but the instrument was not under the seal of the parties. Whereupon, a question arose whether the bonds executed under such authority would be valid under the law of this state of April 1794, sections 15, 16. This law provides that every person to whom distribution of an intestate's estate shall be decreed shall give bond, with sufficient securities in the orphan's court, to refund to the administrator the amount of any debts which may be afterwards recovered against him.

Mr Laussatt and Mr Duponceau contended, that the seal of a stranger may be used by the party; and that one seal is sufficient, though many execute the deed, if they all adopt it, 4 Com. Dig., tit. Fait. A. 2, p. 273; and that the parties in this case had adopted the seal of the notary; but that no seal was necessary, inasmuch as the power of attorney was sufficient by the law of France to authorize the execution of sealed instruments. The bonds so executed were therefore valid by the laws of Pennsylvania, in which the law of nations was in force as part of her jurisprudence; 1 Dall. 114; that it was a principle of that law, that all contracts depended for their validity on the law of the place where they are executed; Henry on Foreign Laws 48, ch. 48, sect. 1; as also the form in which they were executed, 5 Pard. 252, part 6, tit. 7, ch. 2, sect. 2; that no seals were used in France; and all contracts and instruments

DELAUNEY V. HERMANN.

The court will not dismiss a bill for want of proceeding in the cause for three terms, without giving one term's notice of the application for dismissal.

IN this case a bill was filed to October 1825; an answer put in March 1826; exceptions taken and a new answer filed June 1826. On the 11th of October 1826, the plaintiff took out a commission to Bordeaux, which has never been executed or returned. The plaintiff has filed no replication, or taken any measures to procure testimony, or to bring the cause to a hearing.

On the first day of this term, Mr Rawle moved to dismiss the bill with costs.

The opinion of the Court was delivered by BALDWIN, J.

There has undoubtedly been very great delay on the part of the complainant, which is not satisfactorily accounted for; but the respondent has had it in his power, under the thirteenth and seventeenth rules of the supreme court, to compel a reply and a hearing of the cause, which has not been done. He now asks for a dismissal, according to a rule of the English court of chancery, authorizing it, where the complainant has omitted for three terms to proceed in the cause. 2 Madd. Chan. 385. As this rule has never been acted on in this court, we should deem it a rigorous proceeding to enforce it now for the first time, and therefore enlarge it till the next term, of which notice must be served on the complainant.

WILSON V. FISHER'S EXECUTORS.

A citizen of New York obtained a judgment against a citizen of Pennsylvania in a court of the state, which the plaintiff assigned to a citizen of Pennsylvania, whose executors assigned it to the complainant, an alien. Held, that he could sustain a bill in equity in this court, notwithstanding the intermediate assignment to a citizen of Pennsylvania.

WILLIAM BROWNJOHN, a citizen of New York, had obtained a judgment against **Charles Hurst**, a citizen of Pennsylvania, in the supreme court of this state. This judgment was assigned to **William Hurst**, a citizen of New York, in trust for himself and his brothers and sisters, citizens of Pennsylvania. Under this assignment **J. H. Hurst**, a citizen of Pennsylvania, became entitled to two-thirds of this judgment. After his death his executors, also citizens of Pennsylvania, assigned the interest of **J. H. Hurst** to the complainants, who are aliens.

Myers Fisher, also a citizen of Pennsylvania, claimed a part of this judgment, by an assignment from **J. H. Hurst**, and received some part of the money arising therefrom. His executors, the defendants, are also citizens of Pennsylvania. The prayer of the bill is for an account of moneys received under the judgment of **Brownjohn**. The only question raised on the pleadings was, whether the complainants could sue in this court.

Mr Price, for the defendants, contended, that inasmuch as both parties claimed under **J. H. Hurst**, a citizen of Pennsylvania, and the defendants were citizens of the same state, the case came within the proviso to the eleventh section of the judiciary act, which prohibits suits in this court by assignees, in cases where the party originally entitled to a note or chose in action could not sustain a suit. 1 Story 57; *Sere v. Pilot*, 6 Cranch 334.

The complainant represents **J. H. Hurst**, not **Mr Brownjohn**, the plaintiff in the judgment; he had parted with all his interest in the judgment, and so far as citizens of Pennsylvania become entitled to the proceeds, the privilege of suing in this court was extinguished for ever, by being suspended for a time. The judgment is a chose

[Wilson v. Fisher's Executors.]

in action, within the meaning of the law, and comes within the proviso.

Mr Rawle, Sen., for complainant, without inquiring whether a judgment was a chose in action, contended, that it was sufficient to give jurisdiction that the judgment was originally due to a citizen of New York, who was competent to sue in this court, by an action of debt to enforce its payment, or by a bill in equity in a case growing out of it. It is immaterial through whose hands it may have passed by assignment; if the right to the debt is transferred to an alien, or a citizen of another state, he may sue here, not as representing his immediate assignor, but the plaintiff in the judgment.

The cases of *Turner v. The Bank of North America*, 4 Dall. 8, and *Mantelet v. Murray*, 4 Cr. 46, could not be sustained, because it did not appear on the record that the original payees of the notes were aliens or citizens of a different state from that in which the defendant resided. But that objection does not apply here, as the bill avers Brownjohn to have been a citizen of New York at the rendition of the judgment.

The act of congress refers to the capacity of the party to whom the debt was originally due, to sue in the federal courts, his right passes to the last assignee, who, if he is an alien or a citizen of another state, has the same right to sue here, as if he was the plaintiff in the judgment. If the assignment is colourable merely, to give jurisdiction to the court, the court will not sustain the suit. But if made bona fide, and any interest passes to the assignees, and the assignment is real and not fictitious, the court will take cognisance of the case. *M'Arthur v. Smalley*, 1 Peters 623, 625.

Full effect is given to the proviso in the act of congress, if the assignee is in the same situation as the party originally entitled to the debt; it would be straining the law beyond its obvious meaning, to put him in a worse. Here the complainant being an alien, the defendants citizens of Pennsylvania, he comes within the enabling part of the law; and as a suit might have been prosecuted in this court, if no assignment of the judgment had been made, he does not come even within the letter of the proviso. As the judgment merged the cause of action on which it was obtained, the court will require no averment of its nature, or to whom the debt was originally payable.

[Wilson v. Fisher's Executors.]

The opinion of the Court was delivered by HOPKINSON, J.

The bill, in this case, is filed by John Wilson and Israel Wilson, aliens, against Redwood Fisher and others, executors of Miers Fisher deceased, and sets forth: "That on the 2d of July 1787, Mary Brownjohn, Gabriel W. Ludlow and others, executors of William Brownjohn deceased, all citizens of the state of New York, obtained a judgment in the supreme court of Pennsylvania, against Charles Hurst, a citizen of the state of Pennsylvania, for the sum of 6175 pounds 12 shillings and 11 pence, money of Pennsylvania; part of which has been levied and received by the plaintiffs out of the real estate of said Charles, and part thereof, to wit, 1715 dollars 83 cents hath been received by the defendants in this suit. That when this money was received by the defendants, the complainants were ignorant of the rights of Jonathan H. Hurst to a proportion of the said judgment. That on or about the 12th of May 1796, the said judgment, by a decree of the chancellor of New York, was assigned by the said Gabriel W. Ludlow, the survivor of the said executors of William Brownjohn to William Hurst, then of the city of New York, in trust for himself, and for the said Jonathan H. Hurst, and others, his brothers and sisters, each being entitled to one-sixth part. Jonathan afterwards became entitled to two third parts of the said judgment, and died, leaving a will by which he appointed Edward Hurst and Alfred Hurst his executors; who, on the 24th of April 1829, in consideration of 1500 dollars, assigned to the complainants the said two-thirds of the said judgment."

To this bill the defendant has pleaded to the jurisdiction of this court, alleging that Jonathan H. Hurst was, at the time of his death, a citizen of Pennsylvania; that his said executors, at the time of the assignment made by them to the complainants, and at the time of the filing of this bill, and the institution of this suit, were citizens of Pennsylvania. To this plea, the complainants have demurred, and for cause show, that the judgment set forth in their bill, two-thirds of which were assigned to them as set forth in their bill, was obtained by the parties, plaintiffs therein, as executors of William Brownjohn deceased, all citizens of the state of New York, against Charles Hurst, a citizen of Pennsylvania.

The complainants in this bill are aliens; the defendants are citizens of the state of Pennsylvania; and the record therefore presents parties who have an undoubted right to sue in this court, under the provisions of the eleventh section of the judiciary act of 1789, de-

[Wilson v. Fisher's Executors.]

scribing the persons who may sue in the federal courts. But the question arises under a clause in the latter part of that section, by which it is declared as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or *other chose in action*, in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, *if no assignment* had been made."

We do not find it necessary to decide in this case whether a judgment is such a chose in action as to fall within this prohibition or restriction of our jurisdiction. The question now to be disposed of may be determined on other grounds. On the one part it is insisted, that as the present defendants are citizens of Pennsylvania, and both J. H. Hurst and his executors, by virtue of whose assignment the complainants have derived the right now prosecuted, were also citizens of Pennsylvania, who therefore could not have prosecuted this suit against these defendants in this court, it is a case directly within the provision of the act of congress. On the part of the complainants it is answered, that although their right is derived immediately from J. H. Hurst, yet that he derived that right by an assignment from the executors, who were citizens of the state of New York, and had a clear right to prosecute their suit in this court; and the question is thus presented, whether the assignment mentioned in the act of congress has reference to that under which the plaintiff claims directly, or to that by which the right was divested out of the party originally entitled to it. The suit cannot be maintained here unless it might have been prosecuted here, *if no assignment* had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless a recovery of the right claimed might have been had in this court if no assignment of it had been made; and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here.

The question now under consideration has received, as far as we can find, no direct adjudication; but the clause of the act of congress under which it arises has several times come under the notice of the courts. In the case of *Sere v. Pilot*, 6 Cranch 322, the question turned on a distinction set up between an assignment made by

[Wilson v. Fisher's Executors.]

operation of law, and one by the act of the party, the plaintiff claiming by virtue of a general assignment of the effects of an insolvent. The chief justice states the objection to be, "that the suit was brought by the assignees of a chose in action, in a case where it could not have been prosecuted if no assignment had been made." The terms in which the objection is taken and stated, show a disposition to keep to the words of the law, and to oust the jurisdiction only in cases falling clearly, if not literally, within them. In *Mantelet v. Murray*, 4 Cranch 46, we come still nearer to the construction we have adopted. It is there said : "if it did not appear upon the record that the character of the *original parties* would support the prosecution, the objection is fatal." The court here seem to refer the question of jurisdiction to the character of the original parties to the contract, or chose in action, for the recovery of which the suit is prosecuted, without regarding any subsequent or intermediate holder, provided that the plaintiff himself is qualified to sue. The provisions of the act of congress are met if we have good parties on the record ; and the right claimed to be recovered might have been prosecuted here if no assignment of it had been made. The parties to the contract, or chose in action, and the parties to the suit, are looked to by the act of congress ; and we may suggest many doubts and difficulties that would arise if the character of the various persons through whose hands the chose in action might have passed are to be inquired into. So far as we may speculate upon the intention and policy of the legislature in making this enactment, they will be fully answered by this construction.

We are of opinion that the jurisdiction of this court is well maintained in this case ; and that judgment on the demurrer be entered for the complainant.

PACIFIC INSURANCE COMPANY v. CONARD.

A person who holds goods in virtue of a respondentia bond, with an assignment of the bill of lading, may recover damages in an action of trespass against one who takes them unlawfully to the full value of the property, though it exceeds his debt due on the bond.

If a marshal levies on the property of a third person, pursuant to instructions, without any abuse of his authority, he is liable only for the injury actually sustained.

In such cases the rule of damages is the value of the goods, with interest from the time of taking them; or, if they are articles of merchandize, from the expiration of the usual term of credit on sales.

If an auction sale has become necessary in consequence of the levy, the plaintiff will be entitled to recover the expenses of such sale; also the amount of the premium for insurance against fire effected on the goods. But he is not entitled to recover for money paid counsel, or other expenses incurred in prosecuting the suit.

THIS and several other actions of trespass against the same defendant were tried at this term, the facts of which were the same. A number of questions of law were raised in the argument; but as they had been decided in former cases it is not deemed necessary to make a detailed statement of the case, or to notice the arguments of counsel. Vide 1 Peters 386; 4 Peters 291.

The charge to the jury, by **BALDWIN, J.**, was as follows (**HOPKINSON J.** had been counsel in the cause):

In this case there are two questions for your consideration,

1. Whether the plaintiffs can sustain this action.

2. The amount of damages to which they are entitled.

The facts of the case are few. On the 10th and 11th of July 1825 the plaintiffs advanced 60,000 dollars to Edward Thomson on his respondentia bonds. He shipped the money for Canton, took bills of lading, deliverable to his factor John R. Thomson, and assigned them to the plaintiffs. The money arrived safely, and was invested in the teas now in controversy. The teas were shipped on board of the ships Addison and Superior, which arrived in the Delaware on the 15th of March 1826, when, with their cargoes, they were levied on by the defendant by virtue of an execution, at the suit of the United States, against Edward Thomson. The teas in question were landed and deposited in the public stores, under the care of the custom house officer, where they remained until the fall

[Pacific Insurance Company v. Conard.]

of 1826 ; when, by an agreement made between the plaintiffs and the secretary of the treasury, they were delivered to them and sold under their direction for their account.

Immediately on hearing of the levy, the plaintiffs, by their agent, offered to the collector to secure the duties, and demanded the teas. They were refused. On this state of the facts the counsel for the defendant contends that Edward Thomson remained the legal owner of the teas at the time of the levy ; that the plaintiffs did not become the owner or the consignees thereof, or the agents of Thomson, so as to authorise them to enter the teas at the custom house according to the provisions of the thirty-sixth section of the revenue law, which he contends could only be made by Thomson himself. That he being indebted to the United States by bonds for duties unpaid, was, by the proviso of the sixty-second section of the law, prohibited from making an entry without the actual payment of the duties accruing, for which the United States had a lien until they were paid, and that therefore the plaintiffs not having offered to pay the duties on their demand of the teas from the collector, had no right to the possession of the goods, and cannot maintain this action.

Were this a question open for consideration, I should have no hesitation in saying that the whole transaction between Thomson and the plaintiffs made them the legal owners and consignees of the property purchased by the outward shipment, and that as such they had a right to enter the teas on securing the duties without being affected by the delinquency of Thomson at the customhouse ; as much so as if the shipment had been made in their own name, and on their own account.

But it has not been left for me to declare the law in this case. It has been definitely settled by the supreme court in the case of the Atlantic Insurance Company against Conard, decided at January term 1828, 1 Peters 386 ; and the case of Francis H. Nicoll against Conard, at the last term. 4 Peters 291. The first of these cases was an action of trespass brought to try the right of property in the plaintiffs to teas shipped in the Addison and Superior, under circumstances in all respects agreeing with this case. The court decided that they were entitled to the proceeds of what had been sold under the agreement, being the owners and consignees by the agreement between them and Thompson, and the consequent acts. The second was a similar action brought for the same purpose, as well as the

[Pacific Insurance Company v. Conard.]

recovery of damages for levying on certain goods, and a quantity of teas shipped, and in all respects circumstanced like the present. The cause was tried before Judge Washington in this place, and resulted in a verdict and judgment for the plaintiffs, not only for the proceeds of the property which had been sold, but a large amount in damages. It was removed by writ of error to the supreme court, and the judgment affirmed. That case embraced every point material to the decision of this, and connected with the opinion of the court in the former case, leaves for you and the court no other duty than acquiescence in the well established principles which control the cause before you.

The right of property in the teas, which are the subject of this action, has already been settled by the judgment of this court in a former action between the same parties, and is conclusive on that point in this.

But the defendant's counsel contends that in the case of *Harris v. Denny*, decided at the last term of the supreme court, a principle has been settled which will prevent the plaintiff's recovery. The case was this: James De Wolf Jr. was indebted to the United States on duty bonds unpaid; goods consigned to him arrived in the port of Boston, which were attached by his creditors in Massachusetts by a writ in the hands of Denny, the sheriff. The marshal attached the same goods by process from the district court, at the suit of the United States. At the time of the attachment by Denny, the plaintiffs offered to secure the duties, and demanded possession, which the collector refused. On an action by the sheriff against the marshal, the court decided that he could not sustain it, because the plaintiffs in the attachment were neither owners, consignees nor agents; that De Wolf continued the owner, and being delinquent on former bonds, had no right to enter the goods till payment of the duties; and that the plaintiffs, claiming only as creditors, had no right to the possession on the mere offer to secure them. This case has no bearing on the right of an owner or consignee to enter goods on offering to secure duties accruing. It was there declared that the United States had no lien on the goods for the amount due by De Wolf on other importations. It only decided that a mere creditor could acquire no right to the possession of goods so imported consigned to De Wolf, until the duties were actually paid. 3 Peters 191; 4 Peters 148.

The authority of the two cases referred to, does not seem to me to be at all shaken by that of *Harris v. Denny*, and I am therefore

[Pacific Insurance Company v. Conard.]

clearly of opinion, that the plaintiffs have well established their right to maintain the present action for the recovery of damages for the seizure of the goods in question.

It is next alleged, that by the agreement of the 9th of October, and the acts accompanying it, the defendant is released from all claims for damages. The decision of this and the supreme court in the case of Nicoll v. Conard, settles the reverse, and declares that damages may be recovered, notwithstanding this agreement. In this case, the defendant pleaded this agreement as a bar to this action: the court overruled the plea and rendered judgment for the plaintiffs, so that this question has already been settled, as a matter of law, and is not open for your consideration as one of fact.

The counsel for the defendant next contends, that the rule of damages in this case is furnished by the balance due on the respondentia bonds, after deducting the amount of the sales. This ground is assumed by considering the plaintiffs as mere mortgagees of the teas, an idea wholly inadmissible, after the two solemn decisions of the supreme court, each adjudging the legal right of property to be in the respective plaintiffs, as owners; and one of them awarding damages without any reference to the amount due on the respondentia bonds.

These decisions are binding authority on this court, which must be governed by them to their full extent. We are not at liberty to say that the plaintiffs in those actions were legal owners, only to the extent of the debt due them by Edward Thompson. The entire property in the teas was vested in them, and this court has passed the same judgment as to those now in controversy. This action of trespass would assume a singular aspect, if the plaintiffs could not recover damages to the amount of their property, which has been taken from them by the defendant on an execution against Edward Thompson, who had no legal property in these teas. Whether the plaintiffs can, in any event, be considered as trustees for him, his creditors or assigns is not material to inquire in this action. On this question of damages, we cannot settle accounts between trustees and cestui que trusts (if there can be such as to this property), who are no parties to this suit. It is enough for the plaintiffs to exhibit record evidence of their being the acknowledged legal owners. It necessarily results, from such ownership, that they are legally entitled to all the damages arising from its seizure and detention, and the right to damages must be commensurate with the right of property. Any

[Pacific Insurance Company v. Conard.]

other rule would introduce endless confusion and mischief. The plaintiffs then are before you as the legal owners of the teas, and with no legal impediment in the way of their recovery.

The next question for your consideration is the amount of damages which the plaintiffs are entitled to recover, as the legal owners of the teas.

The rule which ought to govern juries, in assessing damages for injuries to personal property, depends much on the circumstances of the case. When a trespass is committed in a wanton, rude and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured, in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard; for a jury may properly take into view, not only what is due to the party complaining, but to the public, by inflicting, what are called in law speculative, exemplary or vindictive damages. But when an individual, acting in pursuance of what he conceives a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if, after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the trial, is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages, *resulting to the owner* by the trespass. These are taken into consideration only in a case more or less aggravated. But where the party, taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case, the defendant acted under • the orders of the government, in execution of his duties as a public officer: he made the levy, but committed no act beyond the strictest

[*Pacific Insurance Company v. Conard.*]

line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him : he has taken the property of the plaintiffs for the debt of Edward Thomson, and must make them compensation for the injury they have sustained thereby, but no further.

It has long since been well settled, that a jury ought in no case to find exemplary damages against a public officer, acting in obedience to orders from the government, without any circumstance of aggravation, if he violates the law in making a seizure of property. In the case of Nicoll against the present defendant, Judge Washington instructed the jury that they might give the plaintiff such damages as he had proved himself to be justly entitled to, on account of any actual injury he had proved to their satisfaction he had sustained, by the seizure and detention of the property levied on, but that they ought not to give vindictive, imaginary or speculative damages. The affirmance of his charge makes it the guide for us, in this case. Our true inquiry then must be, what damages have the plaintiffs so proved themselves to be entitled to ?

There can be no doubt that they have a right to the value of the teas at the time of the levy, with interest from the expiration of the usual credit on extensive sales. You may ascertain the value from the sales made at New York or this place, in the spring of 1826 ; if, in your opinion, they afford evidence of their real value, or if you are satisfied from the evidence you have heard, that the seizure and storing of these teas had the effect of depressing the prices, you may make such additions to the prices, at which sales were actually made, as would make them equal to what they would have been had they come to the possession of the plaintiffs, at the time of the levy.

In marine trespasses the supreme court have, at different times, laid down the following as the rule of damages, in cases unaccompanied with aggravation.

In 2 Cranch 124, 156, the actual prime cost of the cargo, interest, insurance, and expenses necessarily sustained by bringing the vessel into the United States.

In 3 Dallas 334, the full value of the property injured or destroyed : counsel fees rejected as an item of damage. 3 Dall. 306.

In 2 Wheaton 335, the prime cost of the cargo, all charges, insurance and interest.

[Pacific Insurance Company v. Conard.]

In 3 Wheaton 560, the prime cost, or value of the property at the time of loss, or the diminution of its value by the injury, and interest.

In 1 Gallison 315, the prime cost and interest.

In 9 Wheaton 376, 377, the case of the Apollo, where the vessel and cargo are lost or destroyed, their actual value, with interest from the trespass. The same rule also as to the partial injury, when property has been restored, demurrage for the vessel, and interest; where it has been sold, the gross amount of sales and interest, with an addition of ten per cent, where the sale was under disadvantageous circumstances, or the property had not arrived at its place of destination.

In 3 Wheaton 559, a loss by deterioration of the cargo, not occasioned by the improper conduct of the captain, is not allowed. Probable or possible profits on the voyage, either on the ship or cargo, have in every instance been rejected. 9 Wheat. 376, 377; 3 Wheat. 502; 5 Wheat. 389.

In none of these cases do the court recognize an allowance for counsel fees now set up by the plaintiff; but they all seem to concur in adopting a rule which excludes them. No good reason seems to be presented for a distinction between the compensation due to a party injured by a marine trespass, and one committed on land; neither do the judges, in delivering the opinion of the court, refer to such distinction as one existing. In the case of the Apollo, Judge Story observes; "such, it is believed, have been the rules generally adopted in practice, in cases which did not call for vindictive or aggravated damages." And it may be truly said, if these rules do not furnish a complete indemnification, in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation on principles of public policy, 9 Wheat. 379, and in almost all cases, will give a fair and just recompense. 3 Wheat. 561.

In 3 Wheaton 558, the court, in assigning their reasons for giving other damages in the case then before them, remark, that it was one of gross and wanton outrage, without any just excuse, and that, under such circumstances the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutral for all the injuries and losses actually sustained by him. The respondents in that case were the owners of a privateer, who were, as a rule of policy, held responsible for the conduct of the officers and men employed by them, but not to the extent of vindictive damages.

[Pacific Insurance Company v. Conard.]

If the present were a case of marine trespass, I think there is no doubt that the damages could not exceed the value of the teas, and interest, if they had not been restored, or as the result has been a restoration, the injury done by the seizure, which would be the loss in the sales by the fall in the market, and interest for the detention: for there exist none of the matters of aggravation which have induced courts of admiralty to go further.

It is in their sound discretion to allow or refuse counsel fees, according to the nature of the case, either as damages, or a part of the costs, as in the case of the *Apollo*; but by a late case, they were allowed as costs in a case where it was adjudged by the supreme court that no damages could be claimed. They form an item of costs in such courts, but not in courts of common law. It would be legislation by the common law courts, to order them to be taxed as costs. The expenses of prosecuting claims of the present description do not come within the principles established by the courts in causes of admiralty jurisdiction, but seem to be considered as extra damages, beyond the value and interest, where there is aggravation, but not otherwise.

I think it is a safe rule in common law actions of trespass, and can perceive no sound reason for holding a marshal to a harder rule of damage than a naval or revenue officer, or the owner of a privateer. The same principle ought to govern all alike; or, if any discrimination prevails, it should be in favour of the defendant who could use no discretion, but was bound to do the act which has exposed him to this action.

The case of *Woodham v. Gelston*, seems to me to be based on this rule, and the damages recovered in that case were only such as related to the property. The marshal fees were for seizing and keeping possession of the vessel. On the restoration to the plaintiff, he paid them: they were a charge on the property, in the nature of storage or bailment. In sanctioning this item, the court seem to put it on the ground of its being a charge on the defendant, and having been paid by plaintiff, he was entitled to recover it back: but they say, if it had been a mere voluntary payment, a deduction would have been proper. The other items were for wharfage and ship keeping, which were disallowed because they were after the restoration. These were all the claims for expenses presented in that case, and they all attached to the property taken: none related to personal expenses in prosecuting the suit.

[Pacific Insurance Company v. Conard.]

In declaring that voluntary payments shall be deducted, the court settled the principle as to the right to charge for the marshal's fees. They held the jury to strict rules: for they struck out an item of compound interest allowed by the verdict. 1 Johns. Rep. 137, 138.

On the principle of this case of Woodham v. Gelston, the charges of the auction sales are allowable, because such sale had become necessary, and the expenses thereof became a charge on the teas. Also fire insurance, which is a substitute for bailment, and the premium paid in place of storage.

It is all important, that in matters of this kind, the principle which governs them should be fixed and uniform; if we once begin to diverge from the old line, it will be difficult to draw and define a new one with accuracy. It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements, in recovering this property; but the hardship is equally great in a suit for money lent, or to recover possession of land: they are deemed in law, losses without injury, for which no legal remedy is afforded.

I am therefore of opinion, that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements; they being consequent losses only, and not the actual or direct injury to their property which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstance of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.

You will then carefully weigh all the evidence in the cause, and ascertain the true value of the teas, at the time of the levy, or when they could have come into market, by the rules of the custom house, if there had been no claim asserted to them by the United States, other than for the duties, with interest: deducting therefrom the net amount of sales, after payment of duties and charges of sales, the balance will be the amount to which the plaintiffs will be entitled. You will consider Mr Conard as the only defendant. The government is no party to this suit, nor is there any evidence which justifies us in saying that they agreed to indemnify him: that must depend exclusively on the discretion of congress, who are bound by no pledge given by executive officers. You will have no reference, in making up your verdict, to the course which may, in any event, be taken

[Pacific Insurance Company v. Conard.]

there, on an application by Mr Conard for relief. You will award to the plaintiffs such sum as you may think them entitled to receive from the defendant, according to the rules of law, without taking into view the supposed hardship on him. The plaintiffs' recovery is not to be one dollar less than their legal right, though it might ruin the defendant; nor one dollar more, though you might think the public treasury would be opened for his relief.

A verdict was given for the plaintiffs, and the damages found were 42,591 dollars 58 cents. Judgment was rendered accordingly.

This judgment was affirmed on writ of error. 6 Peters 282.

STOCKTON v. THROGMORTON.

Bail to the sheriff entered special bail; on being excepted to he refused to justify, whereupon he was sued on the bail bond; he surrendered the principal before the return of the writ. Held, that the surrender was good, and the bail entitled to relief on the usual terms.

No justification of bail is necessary where it is entered for the purpose of making a surrender.

THE case is stated in the opinion of the court.

Mr Joseph R. Ingersoll, for plaintiff.

The whole proceeding is irregular. When special bail is entered after the expiration of the six weeks after the return of the writ, notice must be given though the bail is unexceptionable. Here special bail was entered after an exception, and without notice, which was a fraud on the plaintiff. This court has decided that in such case they will not give an exoneretur on the bail piece on a surrender so made, or grant relief on a suit on the bail bond; and that bail can have no relief unless they justify and perfect bail after an exception. *Robyshall v. Oppenheimer*, 4 Wash. 317, 334. A surrender by surreptitious bail is not good. 2 W. Bl. 1179, 1180.

Mr Chauncey, for the bail.

As the plaintiff has lost neither a trial or a term, and the defendant is in custody, he has all the benefits of bail perfected, and the bail to the marshal has performed all he undertook to do by the condition of the bail bond. By the practice of the king's bench, bail to the sheriff may surrender after an exception, unless his name has been stricken from the bail piece. In the common pleas he is no longer bail after an exception—fresh bail must be put in; but any person may enter bail to make a surrender, and need not justify though the bail came from Newgate. *Petersdorf on Bail* 234, 235; S. P., 2 W. Bl. 1179. As a universal rule, surrender is equivalent to perfecting bail, and gives the same right to relief on the bail bond suit. 1 Chitty's Rep. 445; Tidd's Pr. 275; 3 Maule & Selw. 283; 4 Taunt. 669. The same rule prevails in New York. *Ex parte Metzgar*, 5 Cowen 287.

[Stockton v. Throgmorton.]

The bail bond never stands as a security where the plaintiff is put in as good a situation as if there had been no delay in entering bail. 1 Harr. Dig. 175, and cases there cited; Cowp. 71. Such is the rule in this state. 2 Yeates 387; 4 Binn. 344; 2 Serg. & Rawle 284. It is a security only where the plaintiff has lost a trial. 5 Serg. & Rawle 50; 1 Sellon 167, 182; 1 Tidd 222, 245, 249; 2 H. Bl. 235; 4 Durnf. & East 352.

The decision of this court in *Bobyshall v. Oppenheimer* was founded on a rule supposed to be laid down in *Harrison v. Davis*, 5 Burr. 2683, "that nothing can be a performance of the bail bond but putting in and perfecting bail." Vide 4 Wash. 334. Judge Washington was misled by elementary writers, who have interpolated the words "*and perfecting*:" which are not in the case in Burrow. There is a sound reason for the distinction. When bail is to remain as a security, it must be perfected; where it is entered only for the purpose of a surrender, it is immaterial who it is.

The opinion of the Court was delivered by BALDWIN, J.

In this case a writ issued on the 29th of July 1829, returnable to October term; a declaration was filed on the 30th of July; the defendant was arrested and gave bond, with Thomas Butler as security, to the marshal, on the 12th of October; Butler entered special bail on the 23d of November; exceptions were filed on the 24th of November; bail did not justify; the bail bond was assigned to the plaintiff on the 16th of March 1830; and sued on the 17th; Butler entered bail anew on the 29th of March, and surrendered the principal on the 1st of April on a bail piece.

The costs on the bail bond suit have been paid. The defendant offered to plead to issue, and try at the present term. Mr Ingersoll now moves for judgment on the bail bond suit; and Mr Chauncey, on behalf of the bail, to stay proceedings.

In support of his motion the plaintiff relies on the case of *Bobyshall v. Oppenheimer*, in this court, which was an action brought to April Term 1822, bail given and the bond filed to October term, when an ineffectual attempt was made to release the bail and dismiss the suit. At April term following, another motion was made to stay proceedings, which was refused, whereupon the defendant pleaded *comperuit ad diem*; plaintiff replied *nul tiel record*, on which judgment was rendered, on an inspection of the record, for the plaintiff. 4 Wash. 317, 333. This case, therefore, is no authority to

[Stockton v. Throgmorton.]

support a motion for judgment, made on the return of a suit on the bail bond. The defendant has a right to plead to this suit, though the bond is forfeited, even if we should refuse to stay proceedings on his motion.

It is a well settled rule, that where a bail bond is forfeited, assigned and sued, the bail will be relieved on paying costs in the bail bond suit, and entering and perfecting special bail in the original action, where the plaintiff has not lost a trial, and on a surrender of the principal is entitled to have an exoneretur on the bail piece. Had the bail justified in this case, or fresh bail been entered and perfected, there is no doubt that a surrender on the 1st of April would have entitled the bail to the relief asked for, as the plaintiff might have had a trial at this term, which is the first at which the original action could have been tried. The only question in this case is, whether the surrender, having been made by bail who refused to justify, and afterwards enter bail anew, has any effect on the plaintiff's action on the bail bond.

There is no doubt as to the principal that the surrender is good; he cannot object to the sufficiency or want of justification of bail. As to all the substantial objects of bail, then, the plaintiff has all that he is entitled to—the body of the principal in prison. It cannot affect his rights, whether the surrender was made by sufficient or insufficient bail; that could be important to him when the recognizance of bail was to remain as a security, a substitute for the body of the principal. In such a case there is no doubt that the bail must justify, or the plaintiff may proceed on his bail bond, as if none had been entered; but when bail is entered for the purpose of making a surrender, and not as a security, there would seem to be no good reason for holding the surrender void. It comes within the principle on which bail is relieved; the exigency of the writ is answered, and we should think ourselves authorized to grant the motion made on behalf of the bail, unless it should appear that the law is clearly otherwise. In *Harrison v. Davis*, 5 Burr. 2683, the original defendant had been arrested, given a bail bond, and surrendered himself to the sheriff, before the return of the writ. The court refused to stay proceedings on the bail bond, declaring “that nothing can be a performance of the condition of the bail bond but putting in bail.”

The sheriff is not bound to give up a bail bond, on a voluntary surrender of the defendant before the return of the writ; it is optional with him to accept the surrender or not: if he does, the bail

[Stockton v. Throgmorton.]

bond is discharged ; 1 East 390 ; 6 Durnf. & East 753 ; 7 Durnf. & E. 122 ; 4 Wash. 336 ; if not, it remains in force till the entry of special bail, and this is all that was decided in Harrison v. Davis. It does not negative the acknowledged right to enter bail, and make a surrender even before the return of the writ—in which case the sheriff must cancel the bail bond. In Orton v. Vincent, Cowp. 71, the only point decided was, that where a judgment might have been had against the original defendant in his lifetime, but who was dead before the motion to stay proceedings on the bail bond, the court would not relieve the bail.

In Bobyshall v. Oppenheimer, 4 Wash. 317, the first application to relieve the bail, and dismiss the suit with costs, was on the ground of the original defendant having been discharged by the insolvent law of a state after the return of the writ on a suit on the bail bond ; special bail had been put in, but on exception filed, refused to justify. The defendant, in the original action, offered to confess judgment, which the court held a sufficient answer to the objection arising from the loss of a trial ; but said it was necessary to put in sufficient bail to entitle the parties to a stay of proceedings on the bail bond suit, as a discharge under the insolvent act, after an assignment of the bail bond, could not affect the plaintiff's rights against the bail. The motion was renewed at the subsequent term, on offering payment of costs and confession of judgment by the principal ; special bail had not been entered, and there was no surrender. The court considered it as an application by appearance bail, without a legal appearance of the principal, refused to discharge the principal on the ground of his discharge as an insolvent, and overruled the motion. 4 Wash. 333. The cases cited by Judge Washington from 1 East, and 6 & 7 Durnford, are all where the principal was surrendered before the return of the writ. The points decided in that case have no bearing on the present ; we must take the reasoning of the court as applicable to the subject before them, and thus far it meets our entire concurrence ; but we cannot consider it as an authority, that bail can in no case be relieved by a surrender of the principal, unless they have justified after exception. Judge Washington adopts a rule, supposed to be laid down by lord Mansfield in the case of Harrison v. Davis, that bail must be put in, *and perfected*—lord Mansfield's words are "putting in bail," the words "*and perfecting*," is a gratuitous interpolation by elementary writers, adopted in some later cases, and thus misleading the judge. With-

[*Stockton v. Throgmorton.*]

out this addition to Lord Mansfield's opinion, it would not have come in collision with the motion now made in behalf of the bail. We shall follow our predecessors, in adopting this opinion as our guide in this case, but omit the interpolation; in doing so, we shall likewise follow other adjudged cases, which are in perfect accordance with the ground taken by the counsel of the bail.

It was settled by the four judges and three secondaries, 2 W. Bl. 758, that no justification is necessary by bail who immediately surrender their principal, notwithstanding such bail may have been excepted against: the same principle was adopted in *Mitchell v. Morris*, 2 W. Bl. 1179; and in *Jackson v. Trinder*, 2 W. Bl. 1180, it was decided that an attorney, though not allowed to justify, might surrender.

In *French v. Knowles*, a surrender made by bail put in after a judge's order, for time to put in and perfect bail, was held good, and the court say that the worth and substance of the bail, who by the surrender are discharged, is totally immaterial, though there was no justification. Barnes's Notes, 111.

So where the surrender is made by bail without justifying, after the expiration of time allowed to justify, and after the assignment of the bail bond. So where the surrender is made by bail who have been rejected, unless their names have been stricken from the bail-piece. 2 Saund. 61, c, note; 5 Durnf. & East 401, 534; 7 Durnf. & East 297. In late cases in king's bench and common pleas, it has been decided that a surrender is equivalent to perfecting bail. 4 Taunt 669; 3 Maule & Selw. 283.

It has been repeatedly decided in the supreme court of Pennsylvania, 4 Binney 344; 2 Serg. & Rawle 284; 5 Serg. & Rawle 50; 2 Yeates 387, that proceedings will be staid on a bail bond suit, where the plaintiff has all the advantage he would have had if bail had been entered at the regular time; the reason and principle of these decisions seem to cover the whole of this case, for by the surrender the plaintiff has all the advantage of perfected bail.

It is believed that there is no case when the bail had been refused relief on the bail bond, where special bail has been entered and a surrender made before the plaintiff has lost a trial, or could have had a judgment against the principal. When bail has been entered for the purpose of making a surrender, it appears never to have been held necessary to justify; this seems to have been required only

[Stockton v. Throgmorton.]

where bail was entered as a security for the appearance of the principal.

Believing this to be the established law of bail, it is our opinion that the bail in this case is clearly entitled to relief on the terms offered; we accordingly overrule the plaintiff's motion, and direct proceedings on the bail bond suit to be staid, on complying with the terms offered.

BURR v. M'EWEN, HALE AND DAVIDSON.

Where land was conveyed on an undefined trust, the trustee is bound to manage it with the same diligence as he does his own property, but will not be held to a stricter rule.

A trustee is bound to pay taxes on the trust property, if in funds. He may advance his own money for taxes, so long as he retains the property, and charge the amount upon it.

He is not answerable to the representatives of the cestui que trust for any improvements made by his directions, or with his approbation, out of the proceeds of sales.

A trustee may charge the trust with fees paid for professional advice, touching the execution of the trust, but not for professional services rendered in the litigation of his accounts.

A trustee is, in Pennsylvania, entitled to a compensation for his services by way of commission, though there is no provision to that effect in the trust deed, or by agreement of parties.

A trustee is not chargeable for not renting property which was not productive when it came to his hands; nor bound to inclose land which was open, unless directed so to do by the cestui que trust.

A trustee who acts in good faith in selling trust property, is justified in selling for the fair market value, though it may not be equal to what its peculiar situation would make it worth to one whose land it adjoins.

Where the trust is general, and no mode of sale prescribed, the trustee may sell at private sale.

A trustee cannot be charged for any negligence or mal administration of the trust which is not set forth in the bill, but it may be considered by the court in fixing his compensation, by way of off-set, not as a substantive claim.

THE following is the substance of the case and matters in controversy.

In 1799, Samuel Blodjet conveyed to the defendants fifty acres of land in the county of Philadelphia, for the nominal consideration of 10,000 dollars, no part of which was paid, nor was there any definite agreement made as to the terms on which the conveyance was made. Blodjet was indebted in a large sum to the defendants and others, which he was unable to pay; he had commenced the erection of a mansionhouse, with out-buildings, on the property; but had left them unfinished, and in a state of dilapidation. The property was uninclosed, wholly unproductive, unsaleable, and at the time of the conveyance, not supposed to be worth more than the amount due the defendants, with their responsibilities incurred for Blodjet.

[Burr v. M'Ewen et al.]

They held the property, paid the taxes and managed it as they would their own ; making advances to him and his family from time to time, who occupied the buildings, such as were habitable. Blodjet furnished plans of improvements, which were executed by defendants, partly in his lifetime, and partly after his death, but pursuant to direction he had given.

After some time the property rose in value. In 1814 the defendants made sales to an amount sufficient to pay themselves their debt, responsibilities, advances and expenses, leaving a great part of the property unsold, including the house and out-buildings which they finished out of the proceeds of the sales. When they found that the property would be more than sufficient to meet the objects of the conveyance, the defendants first began to inquire into the nature of their title; having never considered the property as theirs, except on the terms of the implied trust on which they took the conveyance. They consulted counsel, as well as the friends of the family, among others the trustees of Mrs Blodjet, as to the course which they ought to pursue, stating to them fully all the circumstances of the case. They were advised, that as Blodjet's affairs were wholly deranged, and his children minors, they ought to do no more than to execute the trusts especially confided to them, leaving the resulting trusts to be adjudicated by some competent tribunal. They pursued this course, having no other claim to the property than to be compensated for their services, and any balance of account due them, paid. They waited till they should be called on to give an account of the trust and be discharged from it.

The complainant having administered on the estate of Mr Blodjet, filed the present bill, praying for a discovery of the terms of the trust, with an account, so as to enable him to bring a suit at law to recover the money due from defendants. In their answer, they admit the trust, set forth an account, claim compensation for their services, a lien for the balance due them, and are willing to close the trust under the direction of the court. After exceptions to the answer and an amended answer, an amended bill was filed, praying for a conveyance of the legal title, to certain persons who had purchased the equitable right of Blodjet under a judgment against him. In this answer the defendants submitted to the court to decree according to equity.

The accounts were referred to an auditor, and two other persons selected by the parties, who reported a balance due to the defendants,

[Burr v. M'Ewen et al.]

to which exceptions were filed by the complainant on grounds noticed in the argument.

No allegation of fraud, or breach of trust for their own benefit, was charged on the defendants; none of the sales made by them were objected to before the auditors, except the sale of a small piece of ground sold to Mr Powell at private sale, at an inadequate price, as was alleged.

This piece of ground was situated between the old Lancaster road and the turnpike road leading to the same place, extending from the intersection of the two roads, where it was an acute angle, to the western line, where it was about forty feet in width. By the vacation of the old road, this triangular piece lay between Mr Powell's other land and the turnpike. By purchasing it, he extended his front to the turnpike, which made it very valuable to him; but to any person who did not own the ground back of it, it was of little value, being of an unequal depth, and too narrow for any useful purpose.

Mr Wurtz, for the complainant.

The conveyance to the respondents was in the nature of a mortgage, being to indemnify them for their liabilities for the grantor, and to reimburse them for their payments; the respondents are subject to the same accountability as mortgagees. All the objects of the trust were accomplished by the sales made previous to, and in June 1814, from which time they have no right to make any charges; they having then in their hands, from the proceeds of the sales, a sum sufficient to cover all their liabilities.

Their account for improvements and buildings erected on the estate cannot be allowed, unless such disbursements were authorised by the terms of the trust, were for the benefit of the estate, necessary for the execution of the trust, or were made by the direction of Mr Blodget the grantor. In any other case they could incur no other expenses than were necessary to prevent the property from becoming dilapidated, or for such repairs and improvements as were necessary for its preservation. 1 Johns. Cha. 26, 39; Green v. Winter, 1 Ves. Jun. 327. At all events, as their rights to the property ceased when so much as was necessary to indemnify them had been raised by sales, they had no right to sell in order to pay for such erections; or if such expenditure was authorised, the respondents ought to account for rents and profits, as it was their duty to have rented the buildings.

[*Burr v. M'Ewen et al.*]

No objections are made to any charges incurred in execution of the trust, but we object to the charges for taxes paid after June 1814, and fees paid to counsel for defending this suit. Trustees must pay costs where they litigate for commissions, or deny their liability for interest on money applied to their own use. 1 Johns. Cha. 536. Sums paid for stating the account by executors, or fees to counsel for advice as to the mode of stating it, are not allowable because not for the benefit of the estate. 9 Serg. & Rawle 204. We also object to the charge of commissions, as being exorbitant and contrary to the rules of courts of equity. 2 Madd. Ch. 156; 1 Cruise 556, tit. 12. A mortgagee is not entitled to commissions on rents; 1 Madd. Ch. 534; 3 Atk. 518; and unless provided for in the deed of trust, the trustee can charge only a per diem for his services and his travelling expenses. 1 Johns. Cha. 29.

In this state commissions are allowed to executors, but the highest is five per cent; where the services have been small, and attended with little risk, it is less. 9 Serg. & Rawle 204, 223.

The sale to Mr Powell was a private one; the respondents are therefore accountable for the actual value of the piece sold, especially as it was a violation of the trust to sell after all the debts were paid or provided for. They must also account not only for rents received, but such as might have been raised by the use of proper diligence, 1 Madd. Ch. 527; 2 Fonb. 432, note; being answerable for negligence, though there was no corrupt motive. 6 Ves. 488. We are also entitled to interest on the balance in their hands from July 1814, when it ought to have been invested; 1 Johns. Cha. 508; unless it is shown not to have been used, and kept unproductive for sufficient reasons. *Cox v. Wilcocks*, 1 Binney 194; *Say v. Barns*, 4 Serg. & Rawle 116.

Mr Binney, for the respondents.

Most of the objections to the conduct and account of the respondents were first made before the master and auditors, without being stated in the bill, which is not consistent with the rules of chancery practice. The bill is a peculiar one; it is framed on the ground of the faithful execution of the trust, and a desire on the part of respondents to be discharged from its further execution. No confederacy is charged; no fraud or breach of trust is specially imputed; its object is a discovery of the terms and condition of the trust, and the production of the accounts connected with its execution. The an-

[Burr v. M'Ewen et al.]

swer of the respondents is full to the whole prayer of the bill, and being responsive to its allegations must be taken as true, till contradicted. 7 Cranch 19. The amended bill filed after the answer and account prays only for a reconveyance, an account of commissions claimed, and for new parties; in the answer to which, the amount of commissions was submitted to the court, who referred it to auditors. The effect of these proceedings was to lull the respondents to sleep, and takes them by surprise by being called on to account for rents never received, during a space of twenty-six years.

It is the duty of a complainant to state his injury, how it was done, and the remedy he asks precisely; Mit. 37, 40; to put in issue whatever is intended to be proved, so as to apprise the other party of what he must be prepared to meet. Coop. Eq. Pr. 7. The claim set up in an answer, must also be supported by proof of such specific claim, and cannot be supported by proof of a different one; the proof must be confined to the allegations made in the bill or answer. Sinker v. Smith, 4 Wash. 224; Prevost v. Gratz, 3 Wash. 435; Clark v. Turton, 11 Ves. 240. The pleadings must be amended before hearing, or the party cannot be allowed to prove what is not alleged; whether the hearing is before the court or a master, it is only on the matters in issue, and cannot be more expanded than the allegations of the parties. Consequa v. Fanning, 3 Johns. Cha. Rep. 595.

Every breach of trust relied on must be charged in the bill, so that the respondent may have the benefit of his answer on oath, denying or explaining them; if it is permitted to make them for the first time on a reference of the account, he would be deprived of this right. In this case the administrator may call the trustees to account for money of the estate in their hands, but they are not accountable to him for the sacrifice of the real estate, when it can be no injury to him; the trustees are accountable only to the heir on this subject.

The bill alleges no trust to rent the house or land, or any breach of trust in not doing it; they had no authority to make improving leases, and might have been answerable, if a sale had been defeated by a lease to a tenant in possession, for a trustee must not deprive himself of the power of executing the trust.

Mr Blodget lived fifteen years after the creation of the trust, was conusant of the conduct of the trustees, without objecting to it, and it would not be permitted to him to set up a charge so stale as that now made for not renting the property; the court would presume

[Burr v. M'Ewen et al.]

that he was satisfied with the manner in which the trust had been executed, especially on a bill which does not impeach the fidelity of the trustee. *Arden v. Arden*, 1 Johns. Cha. 330.

In the sale to Mr Powell the trustees exercised their judgment and discretion honestly; the property was of no value to any person but him, and as there could be no competition among bidders at a public sale, it was most prudent to make a private sale; if it was made in good faith the court will not hold them accountable for more than was received, whatever may be the opinion of witnesses as to its value during a rage for speculation. 2 Madd. Ch. 144.

With respect to the money expended in improvements, the answer avers it to have been made according to Mr Blodget's plan, in his lifetime, and with his approbation. The finishing an unfinished building was in the nature of repairs, not coming within the rule of equity which forbids the building or making expensive improvements by a trustee, but in this case was a primary object of the trust, after payment of debts. 1 Binn. 495; 2 Madd. 134, 143; 2 Johns. Cha. 76; 5 Ves. 843; 1 Vern. 144; Amb. 219.

A trustee has a right to charge counsel fees for advice in the execution of the trust, in order to keep them safe, as well as all other reasonable expenses in closing his accounts, where he has been faithful. *Willis on Trustees* 147; 2 Fonb. 176, 177; 2 Madd. 158, 159.

This court has always allowed compensation to trustees; in the case of *Prevost v. Gratz* they allowed a commission of ten per cent. 3 Wash. 434.

Mr Joseph R. Ingersoll, in reply.

The bill was filed in ignorance of the state or nature of the trust; it was for discovery, information, and an account of what had been done under the deed of trust, which are furnished by the answer. But as they declined to settle their account, or to specify the amount of their commissions, a reference to a master was necessary. No detailed account was exhibited till 1821, to which we could file exceptions; those now made are not to any detail, but on principle; and were made as soon as it appeared that the account was made upon principles which we could not admit. We stand as defendants, against whom an account is set up, as a lien on an estate which ought to be conveyed back unincumbered; it is therefore competent in us to answer these charges, by the nature of the trust or the man-

[Barr v. M'Ewen et al.]

ner of its execution, by maladministration or extravagant charges, which we may prove or disprove without raising a charge against the trustees.

The trust was not to protect or improve the property, but a pledge put into the hands of the respondents for their security; no particular services were required from them in order to give a value to the property, nor did they stipulate for any compensation; so that though their services may have been meritorious, they were voluntary, and equity holds them to their contract as to compensation. The case is now heard for the first time on an argument; there was none before the auditors, they are merely the clerks, agents or officers of the court. 6 Cranch 21; 2 Madd. 501. The respondents claim extra compensation for their services, which we resist because they were not rendered. We also set up against it their not renting the property or recovering rent from those who occupied it, as well as for not selling when the property was at its highest price, which are fair off-sets to their claims for extra services in the way of commission.

This trust was like a bailment of personal property to pay a debt, in which the trustee is bound only to ordinary care, and entitled only to ordinary compensation. 2 Lord Raym. 909. When any thing beyond that is claimed, the services must be extraordinary.

The expenditure on the buildings was not authorized by the terms of the trust; it was converting personal property into realty, which a trustee is not authorised to do; he can charge the trust only for repairs and necessary expenses. 1 Ves. 461; 3 P. Wms 100; 1 Vern. 435; 1 Atk. 480; 1 Johns. Cha. 39; 1 Binn. 495.

Compound interest ought to be charged on the balance in their hands from June 1814. 1 Johns. Cha. 620; 5 Johns. Cha. 497.

This court has decided at the present term that counsel fees for prosecuting a suit cannot be included in the damages assessed by a jury. The trustees were bound to avail themselves of the opportunities of selling, during the period when the property was at a high price, and to expose it to public competition; they cannot defend themselves by saying that it was during a rage for speculation, or that the triangular piece was of no value to any one but Mr Powell. It was their duty to put it into the market and test its value by a public sale, and they must be held accountable for such price as, from the evidence, the court may think it would have brought at a public sale.

[Burr v. M'Ewen et al.]

The opinion of the Court was delivered by BALDWIN, J.

The state of the pleadings in this cause is such as would not have admitted of the wide range taken in the argument, if the parties had confined themselves to the allegations of the bill; but as it is desired by both, that all matters which have been discussed, shall be now finally decided, without regard to the frame of the pleadings, the court will consider the whole case.

There is no controversy about the existence, or the general objects of the trust, though they were undefined, resting in an implied confidence that certain things should be done, which seem to have been well understood between the parties, as is evidenced by their conduct, till the death of Mr Blodjet, in 1813 or 1814. The trust was a peculiar one in all respects; it was highly beneficial to Mr Blodjet, by preventing a sacrifice of the property for his debts, as well as having it as a fund, on the faith of which his and the pressing wants of his family were supplied; but to the defendants it was a continued burthen, without any resulting benefit, except indemnity and reimbursement. In its execution the trustees have acted with acknowledged fidelity, without even the imputation of any view to their own profit, in those matters wherein they are charged with negligence, or the unauthorized application of the proceeds of the property. During the life of Mr Blodjet, every thing was confided to the discretion of the defendants, he was conusant of their proceedings without any complaint, nor till the filing of the bill, does there appear to have been any objection to their conduct by any persons claiming the benefit of the resulting trust.

This is therefore not one of those cases where a court of equity is called on to correct the abuses of a trust, by persons having in their hands the estates of minors, or others who cannot supervise the management of their own property, or where productive property has been so mismanaged as to call the trustee to a strict account; still less where the trust fund has been impaired or lost. In this case, the trustees after having paid debts far exceeding the value of the whole property at the creation of the trust, held a portion for the heirs of Mr Blodjet, more valuable now than the whole was then; a court of equity cannot overlook these considerations.

During the first fifteen years of the trust, the trustees were accountable only to Mr Blodjet, for the manner of its execution; neither his personal representative, or his heirs, can call them to any account for what they did with his approbation: he had the sole right to

[Burr v. M'Ewen et al.]

direct plans for the disposition and improvement of the property, which they could carry into effect after his death, in perfect conformity with the conditions of the trust.

From the nature and terms of the trust, and the relative position of the parties, the trustees were bound to act with judgment, discretion and fidelity, in the management and disposition of the property; with such diligence and care, as they would bestow upon their own; but they ought not to be held answerable for acts or omissions which would not be deemed culpable in managing their own concerns, even when acting according to their own judgment. For their conduct, which was known to Mr Blodjet, and not disapproved, or for any thing done pursuant to his directions, they are in no wise accountable, however imprudent or injudicious it may have been.

The first item in the account of the defendants, which is objected to, is the payment of taxes accruing after 1814. As taxes are a lien upon property which is unoccupied, for which it may be sold; 9 Serg. & Rawle 112; or if occupied, the payment enforced by a distress upon the tenants; 10 Serg. & Rawle 255; the trustees were bound to pay them, if in funds, or if not, were at liberty to pay them, it being evidently for the benefit of cestui que trust. This objection is therefore overruled.

It is next objected that the defendants have charged for improvements on the premises, made after the death of Mr Blodjet. In their answer, the trustees aver that these improvements were made pursuant to the directions of Mr Blodjet, and according to his plans; this averment is supported by the evidence, without any contradictory proof. These improvements were the finishing the buildings commenced by him before the trust arose; they were made after the payment of the debts charged upon it, and when there could be no solid objections to complete the arrangement projected by Mr Blodjet, for the accommodation of himself and family, and the ultimate division of it among his children. This objection is also overruled.

Insuring the buildings against fire, was a proper precaution, especially when they were unoccupied; we have during the present term decided that it is a proper charge. This exception is therefore disallowed.

It is next objected, that the defendants have charged for fees paid to counsel for defending this suit.

A charge for professional advice, as to the manner of executing a trust, is undoubtedly proper; but a charge for professional services in

[Burr v. M'Ewen et al.]

conducting or defending a suit, is on a different footing. At the present term we have decided, that a plaintiff in an action of trespass for taking goods, cannot recover counsel fees paid for prosecuting a suit in a case where compensatory damages only could be recovered; *Atlantic Insurance Company v. Conard*; not because such charge may not have been reasonable, but because we were aware of no rule of law to justify it. If we could feel at liberty to sanction such a charge in any case, it would be in this; the principle however has not been recognised in equity, that a trustee shall be allowed his professional expenses in the litigation of his accounts, however fair they may be found on investigation. This exception is therefore allowed, so far as a charge is made for fees to counsel in defending this suit. The next exception is to the charge of a commission for services. Whatever may be the rule in courts of equity in England, or in other states, it is well settled in Pennsylvania, that all trustees are entitled to compensation for their services in the execution of the trust, whether there is any provision or agreement touching it or not. The amount of such compensation depends on the nature of the trust, and the fund or property; as the execution of the trust is more or less burthensome to the trustee, the compensation varies accordingly.

In this case we think the most liberal rate of compensation ought to be allowed, taking into view the situation of the property of Mr Blodjet and his family, the conduct of the trustees, and the ultimate result of their proceedings, which has proved highly beneficial to those now entitled to the property.

As the defendants have specified no sum which they claim for their services, but submitted its amount to the court, we have felt justified in looking to all the circumstances of the case and parties, which, though they afford no reason for withholding from the trustees what is justly due to them, are not without their influence in inducing us to disallow a part of what the auditors have deemed a proper compensation for valuable and disinterested services.

The complainant next objects to the account, that the defendants are not charged with rents.

As neither the original or amended bill contains any charge for the maladministration of the property, we are not at liberty to consider this exception in any other respect than as an offset to the claim for compensation.

There is no pretence that any rents have been received, or any evidence that the renting the property formed any part of the trust;

[Burr v. M'Ewen et al.]

its objects were a sale to pay heavy debts, to preserve and improve the residue for Mr Blodjet's family. The land was unclosed, Mr Blodjet gave no directions to inclose or rent it; after the trustees had been enabled by sales to effect all the purposes of the trust, they held the property, subject to the decree of a competent court, for the final execution of any resulting trust.

Under such circumstances, it was neither their duty, nor would it have been proper for them to have incumbered the property with a lease, as they did not know at what time they might be called on to execute a deed and surrender the possession. Besides, the residence of Mr Blodjet in one of the buildings, with his acquiescence in the conduct of the trustees in suffering the property to remain *in statu quo*, would conclude his representatives from making this charge, either as a substantive claim, or an offset to services otherwise entitled to compensation. The subsequent occupation of the house by Mrs Blodjet, the silence of her trustees, and the whole conduct of the trustees, and cestui que trusts, make such a claim inequitable in every view.

This exception is therefore disallowed. The next is, for not charging the trustees with the alleged value of the piece of ground sold to Mr Powell; not because any more was received by them than they have accounted for, but because they sold for an inadequate price, nor is any collusion between them and Mr Powell pretended. This exception comes within the same rule as the preceding one; the charge having been reserved till the hearing, can be considered only as an offset to compensation.

From the account, it appears that this piece was sold at the rate of 10 dollars the square perch, or 1600 dollars an acre, nearly double the price at which another part of the property was laid off in payment of a debt due the heirs of Mr Sergeant. That the sale was made in good faith, and for a fair price, cannot be doubted; the trustees were not bound to sell at auction, but were left at their discretion as to the time and mode of sale; though it was their duty to sell for its value, they were under no legal or equitable obligation to be governed by the value which the peculiar situation of this triangular piece gave it, to enable Mr Powell to have a front on the turnpike. A court of equity will not hold trustees accountable for not exacting the uttermost from the necessities of others, they will hold a trust fairly executed, if the trustee has converted real estate into money, at its fair value in the market. We have not been satis-

[Burr v. M'Ewen et al.]

fied, that a better price could have been obtained by a sale at auction, or that this piece of property was not sold at its full value. This exception is also overruled. The remaining exception is for not charging the defendants with interest on a balance in their hands in July 1814.

Had the trustees made a charge for their services at the date of the account, it would have made the balance in their favour; or if they had charged interest on their advances prior to the sales, it might have been proper to open an interest account: as none has been opened, and this matter has entered into our consideration in fixing the amount of compensation, this exception is disallowed. The report of the auditors is therefore confirmed, with the exception of the allowance of 400 dollars for counsel fees in defending this suit, and the amount of compensation, which, under the circumstances of this case, is limited to 1500 dollars.

READING V. BLACKWELL.

Where a testator by his will devised his real estate to his executors, and directed them to apply the rents and profits to specific purposes until the happening of a certain event, and then to sell it, and divide the proceeds among certain residuary legatees: *Held*, that the real estate is in equity to be considered as money, from the death of the testator, for all the purposes of the will.

If any of the residuary legatees who were alive, and capable of taking at the death of testator, die before the time of sale, their shares go to their next of kin as personal property.

Where a testator gave special legacies to the same persons who were residuary legatees, and then gave the residue of his estate to the legatees to be divided between them according to their several legacies: *Held*, that the residuary legacies were vested, and on the death of any of the legatees before the time of distribution, became payable to their representatives.

THIS case arose on the will of Henry Harrison, of Princeton, New Jersey, which is as follows:

“In the name of God, amen, this is the last will and testament of Mr John Harrison, of township of West Windsor, county of Middlesex, and state of New Jersey.

“First; I will and direct that my executors pay just debts and funeral expenses as soon as may be after my death; and that they collect the moneys which shall be due and outstanding at that time, to enable them to fulfil the purposes of this my will.

“Secondly; I will and bequeath unto the several persons hereinafter named, the following legacies: that is to say; to my daughter, Cornelia Earl, 2000 dollars; to Susan Earl and Harrison (the daughter and son of the said Cornelia), 800 dollars each; to my sisters, Grace Dennis and Mary Reading, 1200 dollars each; to my nieces, Kitty White, Susan Hough, Amy Prevost, and Sally Stockton, 1200 dollars each; to my nephews, James W. Hamilton and Henry Beckman, 2000 dollars each; to my nephew, William Hamilton, 1000 dollars; to Henry Harrison Hamilton (the son of said William Hamilton), 800 dollars; to Adel Dubarry and Edmond Dubarry, 1000 dollars each (the two last legatees are the children of my deceased niece, Nancy Dubarry); to John Harrison Blackwell, 800 dollars (the last named legatee is the son of Elijah Blackwell); to John H. Prevost, 800 dollars (the last named legatee is the son of my niece, Amy Prevost); to Eliza T. Blackwell, 500 dollars (the

[Reading v. Blackwell.]

last named legatee is the wife of Elijah Blackwell); to the trustees of the church at Princeton, for the support of the gospel in the said church, 500 dollars; to the trustees of the theological school lately established in Princeton (provided the establishment remains there), and for the use of said establishment, 1000 dollars; to Harrison Hough, 800 dollars (the last named legatee is the son of my niece, Susan Hough.) And I do will and direct, that the above legacies be paid by my executors to such of the above legatees as shall be of the age of twenty-one years at the time of my death, as soon as may be after my decease; as to those who shall not be of the age of twenty-one at the time of my death, when they respectively attain the age of twenty-one years.

“Thirdly; I give and devise my real estate in the city, unto Ercurius Beatty, Elijah Blackwell, and Joseph Aunin, hereinafter appointed my executors of this my will, and to the survivor of them and their heirs at common law, of such person in trust to receive the rents, issues and profits thereof, and to invest the same in some safe and productive fund; and to apply the principal, until James H. White (son of my niece, Kitty White) shall attain, or in case of his death, might have attained the age of twenty-one years; to the payment of the yearly sum of 300 dollars to my son, Henry Harrison, if he should return home, and not otherwise; and to the payment of the before named legatees as are under age, as they shall respectively arrive at age, and their legacies become due. And after the aforesaid James Hamilton White shall, or in case of his death, might have attained the age of twenty-one years, then to sell the real estate in the city of New York, for the best price which can be obtained therefor; and in case of my son’s death, to apply the proceeds of such sale, and the rents and profits, in payment of the legacies as aforesaid; and to carry the surplus, if any, to the residuary part of my estate; but if my son Henry Harrison should be living, and return home at or before the said James Hamilton White arrives at the age, or in case of his death, might have attained the age of twenty-one years when such sale is to be made, to pay the one half of the amount of such sale to the said Henry Harrison aforesaid, or to affix annuity for his support during his natural life, at the discretion of my executors, and the other half to be carried to the residuary part of my estate.

“Fourthly; All the rest of my real estate, wheresoever to be found and situate, I will and direct shall be sold by my executors, or the survivor, as soon as may be after my death, and the proceeds thence arising, applied to the execution of this my will; and if any

[Reading v. Blackwell.]

surplus then remain, I give and bequeath such surplus, together with all the rest and residue of my estate, of what nature and kind soever, and the profits thereof, which may remain unappropriated, unto the aforesaid Grace Dennis, Mary Reading, Kitty White, Susan Hough, Amy Prevost, Sarah Stockton, Cornelia Earl, James H. Hamilton, and Henry Beckman, to be divided amongst them in the same proportions as are observed in the express legacies before bequeathed ; and if any of the legatees aforesaid, to whom I have given particular legacies, before they attain the age of twenty-one years should die, then I will and direct that their legacies shall fall into the residue of my estate, and be paid to the residuary legatees in the same proportions as aforesaid.

“Lastly ; I nominate and appoint Ercurius Beatty, Elijah Blackwell, and Joseph Aunin, esquires, to be executors of this my last will and testament ; hereby giving them full power, and the survivor of them, to make and execute good and sufficient titles, in fee simple, to the purchaser or purchasers of any of my real estate. And I do further give and bequeath 150 dollars to each of my executors, in full lieu of commissions and satisfaction for the execution of this my will. And I do hereby revoke and disannul all former wills and testaments by me made, hereby declaring this to be my only last will and testament. In witness whereof, I have hereunto set my hand and seal, and have signed my name in the margin of the first page, the 17th day of June 1815.”

The testator died on the 22d of June 1816. The legatees named in the will all survived him. James H. White arrived at twenty-one years of age on the 26th of March 1830. Sarah Stockton, Henry Beckman and Grace Dennis died of full age, but intestate and without issue, before James H. White came of age. Henry Harrison, the son of the testator, never returned to this country, and died abroad before March 1830.

Immediately after James H. White became of age, the executors sold the real estate in New York and received the purchase money, which they hold, subject to the order of the court. The complainant is a sister of the testator, and one of the pecuniary and residuary legatees, claiming one-sixth of the surplus of the estate in the hands of the executor, on the ground that on the death of the three legatees above named their shares lapsed into the residuary fund, for the benefit of such of the residuary legatees as should be alive at the time James H. White became twenty-one years of age.

[Reading v. Blackwell.]

The respondent is the surviving executor of the will. The question on which the case turned was, whether the residuary legacies of the deceased legatees passed, on their death, to their respective next of kin, or fell into the residuary fund. This fund is composed of the surplus of the whole estate of the testator, but principally of the proceeds of the sale of the property in New York, after payment of the debts and pecuniary legacies.

Mr Joseph R. Ingersoll, for complainant.

The distinction between vested and contingent legacies is, whether the contingency applies to the mere payment, or to the gift. If the gift is absolute, but the payment only postponed, the legacy is vested as a bequest of 400 pounds to A, to be paid in one year after the testator's death; Jackson v. Jackson, 1 Ves. Sen. 217; or after he had served out his apprenticeship; Sidney v. Vaughan; 2 B. P. C. 254; or to be paid at twenty-one. Bolqu v. Mitchell, 5 Ves. 509.

But when the contingency is applied to the gift in the nature of a condition precedent, it is contingent; as a devise to raise "portions to become due and vested at the expiration of two years after my decease, *if my debts shall be then paid*," the legacy did not vest till the debts were paid. Bernard v. Montague, 1 Mer. 422. So if to be paid her at the time of her marriage, or three months after, provided she marries with the consent of my sons. Atleyn v. Herbocks, 1 Atk. 500. The testator looked not to the time, but the fact of the marriage, which makes it a legacy on condition, that cannot vest till it is performed. When there is a certain time fixed, not to the thing, but the execution of it, and the time being so fixed must necessarily come, the legacy is vested; but when the time is eventual and may not come, it is contingent. 1 Atk. 501.

A legacy to A, at her age of twenty-one or day of marriage, to be paid to her with interest, is vested; if given to one at his age of twenty-one, it is contingent; if given to one to be paid at the age of twenty-one, it is vested; Clobberie's Case, 2 Ventr. 342; if given for and towards marriage, it is contingent; Dame Latimer's Case, Dy. 59, *b*; so where the dividends of stock were given to A till he attained thirty-two, and the executor was directed then to transfer to him; Bedford v. Kebble, 3 Ves. 365; Elwyn v. Elwyn, S. P., 8 Ves. 546; 5 Ves. 514, acc.; so wherever the time is annexed to the substance of the bequest; Sansberry v. Reed, 12 Ves. 75; to the legacy itself, and not to the payment; Smell v. Dee, 2 Salk. 415;

[Reading v. Blackwell.]

which was a bequest to A at the end of ten years after my decease; so to A now, in the custody of B, 2000 pounds at the age of twenty-one, to be paid by my executors in England. *Crislow v. Smith*, 1 Eq. Cas. Ab. 295, pl. 6; S. P., 3 P. Wms 20. Where testator directed his land to be sold, and gave 200 pounds to his eldest son "*at his age of twenty-one*," *Cruse v. Barley*, time in such cases being considered as a description of the person to take, the legacy does not vest. 5 Ves. 514.

When a legacy is given "in case" the legatee marries with consent, *Elton v. Elton*, 3 Atk. 504, or to be paid to her at twenty-one, in case she lives to twenty-one, *Dwight v. Cameron*, 14 Ves. 389, it is contingent, the words *in case* being conditional; so is the word "*when*," if not qualified in the will as a legacy given to A *when* he attains twenty-one; *Hanson v. Graham*, 6 Ves. 243; so the word *then*; as a devise to A, if he attains to twenty-one or have issue, *then* to the said A, &c.; *Brownsword v. Edwards*, 1 Ves. 243; so if to A for life, and from and after her death to B, if living at the time of her death. *Doe v. Bagshaw*, 6 D. 512. These are conditions, but if interest is given in the meantime, this is showing the intention to be, that the legatee had an interest in the principal; *Fonereau v. Fonereau*, 3 Atk. 645; and the legacy vests; so where provision is made for maintenance of the legatee out of the principal of the legacy. *Heath v. Heath*, 2 B. C. 4.

Where a legacy is charged upon land on a contingency, the legacy does not vest till the contingency happens, unless a contrary intimation is expressed or to be inferred from the will, though it would have vested had it been a charge on personal property. *Pawlet v. Pawlet*, 2 Ventr. 366; S. C., 1 Vern. 204; *Yeates v. Pittiplace*, 2 Vern. 416; *Jennings v. Looks*, 2 P. Wms 276; *Stone v. Massey*, 2 Yeates 363.

Where a residue is given on a contingency, or when there is no gift, but a direction is given to transfer it from and after or at a given event, the vesting will be deferred until the event has happened, unless the will shows a contrary intent. 1 Rop. on Leg. 383.

In the present case the will shows no intention of the testator that the residuary legatees should take if they died before James H. White came of age; there is no part of it in which there are any words of transmission, as heirs, assigns, executors, &c. The fund being personal, and the legatees named, shows the intention to be not to carry the interest beyond themselves; the survivors take as if those who were dead in March 1830 had died in the lifetime of the testator,

[Reading v. Blackwell.]

or as they would have taken had there been words of survivorship which relate to the survivors at the time of division. *Kripps v. Woolcott*, 4 Madd. 12. The words of the will are: "if any of the persons to whom I have given particular legacies shall die, &c." their legacies shall fall into the residuary fund, which apply to the residuary clause, being in immediate connection with it.

The residue is a mere contingency, depending on there being a surplus, and there was no intention to have such fund in existence till March 1830, as the sale was not to be made till then. One half of the residuum was to go to his son, if he returned previously; which shows the intention to postpone the vesting the fund till the arrival of J. H. White to twenty-one.

Mr Charles J. Ingersoll, for respondent.

This is a contest between legatees, in which the court will incline to make the legacy a vested one, more strongly than in a case between an heir and legatee.

This is a bequest of personal property, in which the time attaches to the payment, and not to the legacy itself; it therefore vests, and is not like the case of a legacy charged upon land. 2 Bl. Comm. 513; 3 Wood. 512; 2 Fonb. 266, 371; 1 Rep. 151; Co. Litt. 237, a, note 152; *Chandos v. Talbot*, 2 P. Wms 412; it does not become contingent because its enjoyment is postponed to an indefinite period; 3 B. C. 471; 4 B. C. C. 491, note; 11 Ves. 489; 13 Ves. 336; and courts favour the vesting of legacies, so as to make them transmissible to the legal representatives of the legatees, 7 Ves. 453; 5 Ves. 140; especially where the dividends are payable till the contingency happens. 4 Ves. 499. Where lands were directed to be sold on the death of the testator's widow, and the proceeds divided among his children when they arrived at twenty-one, the share of a child who arrived at twenty-one, but died before the widow, was a vested interest. *Price v. Watkins*, 1 Dall. 8.

So where the postponement of payment is owing to the situation of the property, out of which the legacy is payable. 2 Yeates 368; 5 Binney 601.

If no time is fixed for the payment of a portion, payable out of land, it is payable presently, and is vested. 2 Madd. Rep. 23.

The particular provisions of this will make these legacies vested, according to the settled principles which govern all the cases. 1

[Reading v. Blackwell.]

Atk. 500 ; 5 Ves. 509 ; 2 Ventr. 342 ; 3 Ves. 362 ; 12 Ves. 75 ; 8 Ves. 546.

No legacies are given except to the members of the testator's family ; and no personal preference is given to any but James H. White, showing the intent to be, not to have the legacies accumulate for the benefit of any individuals, but to have them distributed among the descendants of those who should die before the arrival of J. H. White to twenty-one. It would defeat this intention to give any thing to those who are not of his family, or out of the line of descent from the objects of his bounty.

All the legacies are payable absolutely. No contingency applies to the thing given, but only to events which must happen ; and all did happen. No lapse was contemplated but in one event, which was provided for, the death of minor legatees before the period of distribution ; their legacies fell into the residuum ; had the testator intended that the legacies of the adult legatees should lapse on the same event he would have so expressed himself. But as the will does not direct that the shares of the deceased residuary legatees shall go to the survivors, the court cannot add such a provision. There was no contingency which could defeat the legacies, or the estate out of which they were payable ; the land was to be sold at a certain period, and for all the purposes of the will was personal property from the time when it took effect, and the legacies being charged upon personalty, became vested. 2 Yeates 369.

The opinion of the Court was delivered by BALDWIN, J.

This case turns on the question, whether by the will of Mr Harrison, the residuary legacies of Sarah Stockton, Grace Dennis and Henry Beckman, who were of age at the death of the testator, but died intestate and without issue, before James H. White became, or would, if living, be twenty-one years of age, go to their legal representatives, or fall into the residuary fund, for the benefit of the residuary legatees who were then alive.

The fund out of which the residuary legacies are payable, is principally the proceeds of the sale of real estate in New York, now in the hands of the executors for distribution, and has been considered by the counsel on both sides, as personal property at the death of the testator, for all the purposes of the will (without entering into any argument on this point, though it is one which must be settled before the main question can be decided), and converted into money.

[Reading v. Blackwell.]

The general principal, that land directed to be sold, is, in equity, considered as sold, and as in money, is too well settled to be questioned; on this point, the decisions of the supreme court of Pennsylvania, in *Price v. Watkins*, 1 Dall. 8, of the supreme court of New Jersey, in *Fairlie v. Kline*, 2 Pennington 754, and the supreme court of the United States, in *Craig v. Leslie*, 3 Wheat. 577, are binding on us as authority. The terms of this will are too explicit to admit of a doubt of the case coming within the rule; the real estate did not descend to the heir for a moment, it passed immediately to the executors, the rents were specially appropriated till James H. White came, or would become of age, when the direction to sell was positive and absolute, and the whole proceeds were to be applied to the purposes of the will. No contingency could happen, by which any part of the fund could revert; the whole must go either to the residuary legatees, or the representatives of those who died before the time of division. A contingent provision was made for the testator's son, his heir at law, on condition of his return to this country; but this provision was made out of the proceeds of the land, and not a charge upon it; it was made too on a condition precedent, which was not performed, so that the real estate could in no event revert to the heir as land, or he become entitled to any part of the proceeds as money. The inheritance was destroyed to all intents and purposes, and the estate irrevocably converted into personalty, and so we must consider it for all the purposes of the will.

In some respects its meaning admits of no doubt. It directs the residuary fund to be divided among the residuary legatees, in proportion to the express legacies given to them respectively; the division being unequal, they take as tenants in common, and not as joint tenants.

The rents and profits, during the lifetime of his son, until the maturity of James H. White, are specifically appropriated; the residuary fund is, therefore, a remainder, bequeathed to tenants in common, who were all alive and of full age at the death of the testator, and fully capable of taking the bequests.

The only lapse provided for in the will, is in case any of the legatees, who were minors at the death of the testator, should die before twenty-one; their specific legacies shall fall into the residuum, and be paid to the residuary legatees, in the same proportions as before directed. This lapse is for their benefit, and as none other is ex-

[Reading v. Blackwell.]

pressly provided for, it is a strong indication of the intent of the testator, that there should be no other lapse in any event.

The two events on which the division was to be made, are the arrival of James H. White to twenty-one, or the time when, if living, he would have attained that age, and the death of the testator's son, both of which were certain to happen. If, therefore, there was any interest vested in the residuary legatees before the happening of these contingencies, it could not be defeated. This brings us to the main question, whether there was any such interest: in the consideration of which we shall refer to the general principles established in cases in equity, rather than to the cases themselves.

It is not necessary to the vesting of a legacy, that it be capable of present enjoyment in possession; it is vested when the gift is immediate in interest, of a present right of enjoyment to a person capable of future reception in possession, on the happening of some event which is certain. It is contingent when the gift is prospective to a contingency, when no present right to future enjoyment is given, or given to a person who has not a present capacity to take and enjoy the thing given, let the contingency happen when it may. The present gift and the present capacity refer to the death of the testator, when the will takes effect.

If the contingency is attached to the thing, or right given, or the person to take, the interest is contingent; if it is attached to the time when the thing or right is to be enjoyed, it is vested, the contingency referring merely to the payment or division. In the former case, it is in the nature of a condition precedent, which is the consideration of the gift; but in the latter, it is the mere postponement of payment of what is due by absolute right. This does not make the legacy contingent, unless the postponement arises from the situation of the legatee on account of the want of an existing present capacity to take and enjoy; or when the ascertainment of the person to take, is referred to a future period, and the right to take depends on his being in esse at that time. Nor if the postponement is owing to the situation of the estate or fund, out of which the legacy is to be paid, can the legacy on that account be held to be contingent. Vide 1 Rop. on Leg. 375, et seq., and cases cited.

The words of this will, speaking at the death of the testator, are *in præsentî*. "I give and bequeath," the gift is present and absolute, the legatee is alive, and capable of taking and enjoying, the thing bequeathed was in existence, and must be enjoyed on certain events

[Reading v. Blackwell.]

which attach to the distribution or payment only, and not to the right to the legacy.

By the mode of distribution among the residuary legatees, the testator has referred to the special legacies, which are unquestionably vested in the adult legatees, and do not lapse by their death. As these legacies are made the standard of distribution among the residuary legatees, it is clear that the residuary fund should go to the same persons who were entitled to the special legacies given to those who should die before they arrived at twenty-one. The surviving residuary legatees could not take the special legacies of the deceased adult legatees; if then we decree the residuary fund to the survivors, we make a rule of distribution among them incompatible with that prescribed in the will.

In looking at its provisions, it is apparent that the object of the will, in postponing the payment, was for the convenience of the estate out of which the legacies are payable; it was to provide a fund from the rents and profits to meet specific purposes, without the least reference to the situation of the residuary legatees. When these purposes were effected, the executors became their trustees as to the remainder bequeathed to them, the right to which in possession was consummated at the time fixed for distribution. This remainder was the capital of the fund created by the sale of the real estate; it was carefully reserved by the testator for the residuary legatees, who were his nearest relatives, and he could not have intended, that on the death of any of them, their shares should be taken from the next of kin, and go to strangers to the deceased.

We are, therefore, clearly of opinion, that by the words of the will construed according to the best established rules, the residuary legatees had a vested right to their respective proportions of the residuary fund at the death of the testator, which, on the death of any of them before the time of payment, passed to their next of kin. Vide 1 Rep. 380, 394, 397, 436.

In addition to the settled course of adjudications in courts of equity, we have also, in support of our opinion, the case of *Fairly v. Kline*, before referred to. In that case, the testator disposed of his personal estate among his wife and children, he devised his homestead plantation to his wife for life, or while she remained his widow; after her death or marriage, he directed it to be sold, and gave the proceeds thereof to his eight children, whom he named, to be equally divided among them, share and share alike. One of the children died

[Reading v. Blackwell.]

before the death or marriage of the mother, or the sale of the land; and it was held, that her interest was vested, and on her death went to her representative. 2 Pennington 754. This case is entitled to great respect, on account of the character of the court which decided it; the more especially, as evidence of the law of New Jersey, in which state the testator was domiciled and resided at the time of his death. 1 Binney 836.

Being then of opinion that the complainant is entitled to no part of the fund bequeathed to the deceased residuary legatees, our next inquiry is, whether any provision made for the son of the testator, can have any effect on the case.

It is admitted, that he never returned to this country, and died before the time when J. H. White could become of age. This is the very case contemplated by the testator, in which he directed the whole residuum to be distributed among the residuary legatees; this direction must be followed, if the legal effect of the limitation in favour of the son, does not prevent it.

The first provision for the son, was the payment of an annuity of 300 dollars out of the rents and profits of the real estate, "if he should return home, and not otherwise;" this is clearly given on a condition precedent, and as the son never returned, was no charge on the estate or its proceeds.

The next is a direction to sell the real estate; "and in case of [his] son's death, to carry the surplus, if any, to the residuary part of [his] estate; but if my son, Henry Harrison, should be living, and return home at or before J. W. White arrives at the age, or in case of death, might have attained the age of twenty-one when such sale is to be made, to pay one half the amount of such sale to the said H. H., as aforesaid, or to affix annuity for his support," &c. This provision was made dependent on an act to be done by the son, in a definite time, which made its performance a condition precedent, and indispensable to the vesting of any right to the surplus; it has not been performed, and the events contemplated by the testator have both happened, on which a final and absolute distribution of the fund is directed. Neither of these provisions for the son affecting the disposition of the fund, it must be paid to the surviving residuary legatees, and the next of kin of those deceased, in the proportions of the special legacies to them respectively; the next of kin taking by representation, the survivors per capite. The consequence is, that the complainants take nothing by their bill, and it must be dismissed.

Circuit Court of the United States.**NEW JERSEY, OCTOBER TERM 1830.****BEFORE****HON. HENRY BALDWIN, Associate Justice of the Supreme Court.****HON. WILLIAM ROSSELL, District Judge.****RINEHART AND WIFE v. HARRISON'S EXECUTORS.**

It is no exception to the rule, that land directed to be sold and turned into money, is considered as money from the death of the testator, because the period of sale is remote, and the conversion cannot be made till the time arrives.

The rule applies to a bequest of the proceeds of the land to a residuary legatee, unless he has made an election to consider the proceeds as land; none but the first taker can make an election.

Such election cannot be by any person who is not entitled to the whole surplus.

There is no resulting trust to the heir, when all the bequests in the will take effect.

If the proceeds of land devised to be sold, are given to a feme covert, who dies before there can be a sale, the legacy is vested, the right to it devolves on her husband; and if he also dies before the sale, it goes to his representative, and not to the next of kin of the wife.

THIS case arose on the will of Henry Harrison, which is set out in *Reading v. Blackwell*, ante p. 166. The following case is agreed on by the parties:

John Harrison, late of the county of Somerset, and state of New Jersey, made his last will and testament, bearing date the 17th day of June 1815, and died on the 22d day of June 1816, without revoking or altering the same, prout the said will, which is made a part of

[Rinehart and Wife v. Harrison's Executors.]

the statement of the case. Sarah Stockton, one of the legatees named in said will of the said John Harrison deceased, was the lawful married wife of Job Stockton, and died after the said John Harrison, to wit on the 18th day of October 1818, and without issue; and on the 26th day of November, in the said year 1818, administration of the goods and chattels, rights and credits which were of the said Sarah Stockton, were granted by John Frelinghuysen, surrogate of the county of Somerset, to the said Job Stockton, her husband, without bond or filing an inventory. Job Stockton departed this life intestate, in the month of February 1820, without having received any part of the said legacy bequeathed to the said Sarah Stockton; and on the 30th day of March 1821, letters of administration de bonis non, of Sarah Stockton, were duly granted by the surrogate of the county of Somerset, to Ebenezer Stockton and James S. Green. It is further admitted, that Adela Rinehart is the lawful married wife of John Rinehart, and that Adela Rinehart is the niece and one of the heirs at law of the said Sarah Stockton. If the court shall be of the opinion that the said John Rinehart, and Adela his wife, are entitled to any part of the said legacy so bequeathed to the said Sarah Stockton, then it is admitted that the said part is the one moiety of the said legacy, after allowance of the expenses of this suit, and the settlement of the estate of the said Sarah Stockton with the orphan's court of the county of Somerset.

If the court shall be of opinion that the said John Rinehart and Adela his wife, are not entitled to said legacy, or any part thereof, then the same is to be paid by the said administrators de bonis non of Sarah Stockton, to the administrators of Job Stockton deceased, for the benefit of his creditors and legal representatives. The fund in dispute proceeds from sales made by the executors in the month of 1830, of that part of the testator's property which is thus disposed of in his will, viz.: "and after the aforesaid James Hamilton White shall, or in case of death, might have attained the age of 21 years, then to sell the said real estate in the city of New York, for the best price which can be obtained therefor; and in case of my son's death, to apply the proceeds of such sale, and the rents and profits thereof, in payment of the legacies aforesaid, and to carry the surplus, if any, to the residuary part of my estate."

The death of the testator's son is agreed. Should the court desire any further addition of facts, with a view to the justice of the

[Rinehart and Wife v. Harrison's Executors.]

cause, such facts shall be added, and the case argued upon its merits, with no regard to form, further than is necessary in the court's opinion.

Mr C. J. Ingersoll, for complainant.

It is admitted that Sarah Stockton took a vested interest in the New York estate, but she took it as land, being capable of taking it in no other way, as she died before the trustees had any power to sell it, and while it was held as land, according to the express directions of the will appropriating the rents to specific purposes. Until March 1830, when James H. White would become of age, the testator had stamped the estate with the character of land, which it must retain till the power to convert it into money arose. In such a case, the equitable fiction, that land directed to be converted into money, is considered as actually so converted, does not apply. As was expressed by the court in *Reading v. Blackwell*, the rule applies to cases where it is for the benefit of those for whom the conversion is to be made, and to answer the purposes of the will ; but if they are all satisfied, and there is a residue not required for any object expressed in the will, and no person pointed out who can take, it shall go to the heir. *Dailey v. James*, 8 Wheat. 531, *semb.* *Smith v. Folwell* ; S. C., 1 Binn. 558.

The question must turn on the intention of the testator : if we suppose him to have contemplated the event which has happened, he could not have intended the bequest for the benefit of a stranger, and would have guarded against its going to the administrator of the husband, for the benefit of his relatives, to the exclusion of those of himself and niece. Judicial construction of the English statutes of distribution, and its adoption in this state, may make the husband next of kin to his wife ; but it cannot be pretended that such construction was in the mind of the testator, or that it is consistent with reason or justice.

The court will construe this will according to the directions and intention of the testator, this is the basis of the rule for considering lands as money, in cases like 3 Wheat. 577, and 2 Pennington 754. As laid down in those cases, the rule is conceded, because there was a possibility of taking in possession, but in this case there was an express direction that no sale should be made till 1830. Had this been the case of a deed to the trustees, to hold the land for fifteen years, and then sell, the interest of Mrs Stockton would, on her death within the fifteen years, have gone to her heirs as land.

[*Kinehart and Wife v. Harrison's Executors.*]

Equity would consider it otherwise, only for the objects and purposes of the will; 1 Br. Ch. 497; 3 Wheat. 583; the rule being one of intention, and for the benefit of the heir. To hold this estate to be money, during the time when it is not to be sold, is to injure the heir and give a character to the estate directly the reverse of that stamped upon it by the testator. From the time of *Roper v. Radcliffe*, 9 Mod. 170, it has been settled, that the land devised to be sold, is money to pay specific legatees; it is otherwise as to the heir or residuary legatee. *Cruise v. Bailey*, S. P., 3 P. Wms 20; *Attor. Gen. v. Weymouth*, Amb. 20; *Walker v. Dennie*, 2 Ves. Jun. 154; *Emblyn v. Furnan*, P. Ch. 541; 1 Br. Ch. 503. The intention of the testator must be, to make the conversion out and out, to all intents and purposes, or the part which is not effectually disposed of will result to the heir. 3 P. Wms 22, note; 1 *Roper on Leg.* 351. So where there is a surplus, after answering the particular purposes of the will, and there is a general bequest of the personal estate, the proceeds of land go as land. *Roper on Leg.* 352, 355. This is the case now before the court.

Blending the real and personal estate will not make land money, if done for special purposes, unless such is the clear intent; 1 *Roper on Leg.* 356; nor will such intent be presumed but for the purposes expressed; 1 *Roper on Leg.* 360, and cases cited; when such purposes fail, the disappointed fund goes to the heir; *Roper on Leg.* 363, 367; 10 Ves. 500; so of a lapsed legacy to be paid out of realty. *Roper* 362.

In this case, the share of Mrs Stockton was realty at her death, and as such, passed to the complainants as her heir, before it could become personalty consistently with the will, which impressed it with the character of land when the right of the heir attached. It could not come to the legatees as money, till 1830, and then the testator gave it to the specific legatees with the evident intention that it should not go out of the family. This was not a case where Mrs Stockton could make an election before 1830, because she died before the land could be converted, which is conclusive to show that it was not and could not be money. She might have elected after 1830 by the aid of a court of equity. 1 *Roper* 372. There was no mode by which the residuary legacy could have been recovered before 1830; it could by no possibility be reduced into possession by the husband after her death, and no right passed to him, as the interest she held was in the land. In *Reading v. Blackwell*, the contest

[Rinehart and Wife v. Harrison's Executors.]

was between the specific and residuary legatees, both claiming under the will ; here it is between the heir of the legatee and a stranger, who claims out of the will, as to whom there was no vested interest in the fund, because there was a physical impossibility that it could be money at her death, and he could have no pretence to it as land. Whatever therefore may be the law as to the husband's right to his wife's property, in possession or action, he could have none in this legacy, because it could not have been reduced into possession in her or his lifetime. It was no debt or right which either could have assigned, or which creditors could take.

Mr Green and Mr Wall, for respondent.

In *Reading v. Blackwell* this will was held to give a vested interest to the residuary legatees ; and that the fund was to be taken as money, on the authority of *Craig v. Leslie*. As Mrs Stockton died intestate, her legacy must go according to the statute of distributions, and its construction in England and this state, which has adopted the statute of 22, 23 and 29 Car. 2 (Rev. Code 179, sect. 15).

This legacy was the personal property of the wife, on which the husband had a right to administer ; 4 Co. 51 ; Co. Litt. 351, a, note 304 ; to recover and to receive to his own use without accountability ; or he might sue for it in her lifetime, as soon as it became payable, by the terms of the will, the postponement of which does not affect his right in the legacy. *Toller's Ex.* 224, 225. If he dies without administering, it goes to his representatives, and not her next of kin ; and an administrator on her estate is trustee for the husband, whether it is in possession or action ; he or his representatives take it absolutely ; 1 P. Wms 378, 381 ; 1 Atk. 458 ; 3 Atk. 526 ; 1 Wilson 168 ; 6 Johns. Rep. 112, 117 ; 5 Johns. Ch. 206 ; 7 Johns. Ch. 244 ; 2 Conn. 564 ; he being considered the next friend and nearest relation.

He administers in jure mariti, and holds by the construction of the statute as next and nearest relation within its equity. 2 Vern. 302 ; 1 Ves. Sen. 15 ; 11 Vin. Ab. 88, pl. 25, 26 ; 2 Eq. Cas. Ab. 423, pl. 7 ; *Toller* 83, 84. In New Jersey he administers on her estate without giving a bond ; Rev. Code 177, sect. 11 ; and in the case of *Fairlie v. Kline*, 2 Pennington 758, the supreme court held that the husband was entitled to the proceeds of land sold in which his wife had a vested interest, though she died before the land was or could be sold, which decision has never been questioned in this state, and is conclusive on this point.

[Rinehart and Wife v. Harrison's Executors.]

The rule of courts of equity in relation to land directed to be sold, is to effectuate the intention of the testator, which is manifest in this case; he disposes of the whole estate as money, no part is in any contingency to go as land, the legatees are put on the same footing, they all take vested interests, which can, in no event provided for, lapse, or fall into the residuum of the estate. He makes the complainant's wife a legatee, which denotes the extent of the provision intended for her; the legacies are not carried on beyond the first takers, in whom they vest absolutely in interest and in possession, immediately on the sale; leaving the legacies transmissible, according to the course of the law, to the representatives of the legatees, in the same manner as if they had died in possession. There are qualifications of the rule, but the complainants come within none of them; the cases referred to are of lapsed legacies, which result to the heir on the principle that his right shall not be affected, unless there is a plain intent expressed in the will to do it. They can have no application here, because complainant claims, not as heir of the testator, but of Sarah Stockton, and as her next of kin. Both parties claim under her, each claiming the interest which was vested in her; neither can recover if it was contingent, and lapsed by her death before the maturity of James H. White. As this contingency applied only to the time of paying the legacy, for the benefit of the estate, without any reference to the character or condition of the legatees, nothing could intervene to prevent the legacies from vesting in possession. This brings the case within the universal rule laid down in 3 Wheat. 577, 578, that land directed to be sold is, in equity, money from the death of the testator, whether sold or not. The same rule has been adopted in this state, where a life estate was given in the land, and the distributee died before the tenant for life, and before the land could be sold; it was held that the land was money, and passed as such. 2 Penn. 754.

This case is the stronger, as the distribution was unequal and arbitrary, wholly inconsistent with the intention of dividing it as land, among tenants in common. The inheritance was destroyed for the purpose of creating a residuary fund, composed of the proceeds of the sales, together with the rents and profits previously accrued. This fund, with all the residue of his estate, of whatever kind, is given to the residuary legatees, and so far from intending any thing to his heir as land, he makes a contingent provision for him out of the fund to be raised by the sale. The testator also directs the whole real

[Rinehart and Wife v. Harrison's Executors.]

estate to be sold, and the proceeds to be applied to the execution of his will, which stamps it with the character of personality.

Mrs Stockton had no right of election, or if she had, did not exercise it; thus leaving her right to depend according to the directions of the will, and with all legal consequences. 3 Wheat. 582, 583; 2 Ves. 174, 176; 2 Atk. 373; 3 Ves. 49; 13 Ves. 338; 7 Ves. 280; 19 Ves. 111. It is immaterial whether the land is sold or not; it is money though a devisee is living on it; 3 Ves. 49; it must be considered as sold, the money paid over, and the fund is liable to the legacy duty. 1 Bro. Ch. 503; 1 Price. 426.

No case supports the position, that where the land cannot be sold on account of some particular estate having been devised, or other event, it cannot be considered as money until there could be a sale. The court always looks to the final object to be effected, if that requires an ultimate conversion into money, and the fund is made distributable, as the proceeds of the land, it has never been considered as land. Here the testator has directed a conversion out and out, of his whole real estate, and his entire disposition of the proceeds must be defeated, if such conversion is not deemed to have been made from the time of his death.

The opinion of the Court was delivered by BALDWIN, J.

This case turns on the question, whether the two legacies, one specific and the other residuary, bequeathed to Mrs Stockton by the will of Mr Harrison, are now payable to the representatives of her husband, or her heirs and next of kin.

In the case of Reading v. Blackwell, decided at the last April term of the circuit court for the eastern district of Pennsylvania, it was held, that all the legacies vested at the death of the testator, and did not lapse by the death of any of them, before the time of distribution and payment. It is not the interest of either party to question this construction of the will, as they both claim in virtue of a right vested in her, which, by her death, has devolved on one of them; the representatives of Mr Stockton can claim in no other way, nor can the complainant claim in the right of his wife by substitution. This could only be done if the bequest to Mrs Stockton had failed of taking effect, and the words of the will had shown, or justified the inference, that the testator had in such event, intended to substitute the heir, or next of kin of Mrs Stockton. 1 Roper on Legacies 337, 338, 339, and cases cited. We can perceive no such

[Rinehart and Wife v. Harrison's Executors.]

intention in any way manifested in this will, and feel bound to give it the same construction between the parties to the present suit, as was given in *Reading v. Blackwell*.

Considering the interest of Mrs Stockton as vested, and transmissible to her legal representatives, the next question is whether it was land or money at the time of her death.

The directions of the will are very positive, to sell the whole of his real estate, and to make the proceeds a personal fund for the purposes of his will; it creates no trust in favour of any person as devisee of real estate, the profits arising before a sale are specifically appropriated to the payment of debts, legacies, and an annuity to his son. When sold, the proceeds are to be carried to the residuary fund, after paying the special legacies, which fund is appropriated as a surplus of the proceeds of the real estate, one half to his son, if he was alive and returned home before the period appointed for the sale; the other half to be divided among the nine residuary legatees, in proportion to their specific legacies.

The time of the sale is fixed, the direction to sell is absolute, the only contingency on which it depends is as to time; so that no event can occur or intervene to prevent the distribution of the proceeds among the residuary legatees, as tenants in common. This disposition requires the application of the whole estate in a manner so utterly inconsistent with a division of real property, as leaves no doubt of the testator's intention to make an "out and out" conversion of his real estate into personalty, for the purposes of distribution, in the very special manner directed. No contingency is provided for in the will, which refers to a reconversion of this residuary fund into land, for the benefit of any person named in the will, or the heir of any legatee, or of the testator; the contrary intent is most manifest. As there are no words of limitation to the devise of this fund, it would pass only a life estate to the distributees as real estate; whereas as money they take it absolutely, and take it in the character which the testator has impressed upon it, by disposing of it as "a residuary fund;" "the proceeds of the sale of the land," "the surplus;" the sums directed to be taken from it, he calls "legacies," and the distributees "legatees," without one word which would be applicable to it as real estate. These provisions of the will bring this case within the well settled principles of courts of equity, which are very correctly laid down by Mr Roper, in his very valuable work, from the adjudged cases referred to in 1 Rop. on Leg. 341, 352, 356, 358, 364, 365, 369, 372,

[Rinehart and Wife v. Harrison's Executors.]

373. These cases fully establish the rule, that land directed to be converted into money, is in equity to be considered as money, for all the purposes of the will. 3 Wheat. 564, 577.

The counsel for the complainants consider this case as an exception to the rule, because the testator has postponed the sale of the New York estate to the maturity of James H. White, an event which could not happen till March 1830; that therefore Mrs Stockton having died before there could be any actual conversion of land into money, had a vested interest only in the land, which passed on her death to her heir, and not to her personal or legal representatives. This construction, it is said, would meet all the purposes of the will, so far as they related to her, or the interest devised to her. But these purposes must be ascertained by looking at what the permanent and final objects to be effected were; if these require an out and out conversion of the estate into money, the court must overlook such as are temporary, which do not require, or even forbid, such conversion for a specified time. This discrimination is most carefully made by the testator, by directing a special application of the rents accruing till the period of sale arrives, and then making a final and absolute appropriation of the proceeds, as a fund to be created by the sale, which became indispensable to its distribution, in the manner directed. This can only be done by considering the New York estate as money, for all the purposes of final distribution, so as to give Mrs Stockton a right to her proportion of the ninth part of the residuary fund, vested in interest, but the payment postponed till the sale, and transmissible as personal property. Had she lived she must have received it as such, and whoever is entitled to it, must take it as she would have done. Her death before the time of payment, during the continuance of a life estate, or other temporary disposition of the land, will have no effect on its character; it will be considered as money from the death of the testator, when the direction for a sale is absolute, and the proceeds disposed of as money. 1 Rop. on Leg. 369; 4 Madd. 484; Smith v. Claxton, 1 Br. Ch. 497; Fletcher v. Ashburnham.

It is deemed unnecessary to review the decisions of the English courts of equity on this subject, as the supreme court of the United States have examined it fully, and settled the law in the case of Craig v. Leslie, 3 Wheat. 564, 577.

Land was devised to trustees to sell, and pay the proceeds to the testator's brother, residing in Scotland; the land lay in Virginia,

[*Rinehart and Wife v. Harrison's Executors.*]

where an alien could not hold real estate by devise, but could take and hold personal property. The trustees refused to sell; but on a bill filed by the brother it was held, that it was a bequest of money; the court ordered a sale, and the proceeds to be paid to him, affirming the rule universally to be, "That land directed to be sold and turned into money, and money directed to be employed in the purchase of land, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given. The principle on which the doctrine is founded, regarding substance and not the forms, considers the thing directed to be done as done, where nothing has intervened to prevent it." To this rule there are qualifications. Where the person for whose use the land is to be sold elects to hold it, he may do so, but he must make the election in fact, and in his lifetime; the right to make the election does not change the character of the property, which passes to the persons entitled, in the same manner as if the conversion had been made in the lifetime of the first cestui que trust. So where all the purposes of the conversion are effected, or some of the devises cannot take effect, there is a resulting trust for the heir at law, "as the old use not disposed of." So where the residuary legatee is the cestui que trust of the whole beneficial interest in the money to arise from the sale of the land, he has the same right of election, and resulting trust. 3 Wheat. 577, 585. But none of these qualifications apply to the present case. Sarah Stockton did not make the election, the purposes of the will require the application of the whole fund, every bequest has taken effect, there is no use not disposed of, and she was not the cestui que trust of the whole beneficial interest, but only of her proportionate ninth part. The counsel for the complainant have considered, that the rule laid down in the third proposition in *Roper v. Radcliffe*, 9 Mod. 170, 171, "that in respect to the residuary legatee, such a devise shall be deemed as land, in equity, though in respect to the creditors and specific legatees, it is deemed as money," is to be taken as a settled principle. But it is expressly overruled in *Craig v. Leslie*, unless the residuary legatee has made an election in his lifetime. 3 Wheat. 585, 586.

The same principles have been affirmed by the supreme court of this state in *Fairlie v. Kline*, 2 Pennington 754. In that case the testator devised his homestead to his wife for life, or widowhood; on her death or marriage he directed his son to sell it, and divide the money arising from the sale among his eight children, whom he

[Rinehart and Wife v. Harrison's Executors.]

named, among whom was the wife of the plaintiff. The testator died in 1785, leaving his widow and eight children alive, the plaintiff's wife died in 1792, leaving five children and her husband, who administered on her estate, the land was sold by consent of all parties in 1797, the widow died in 1801. It was held that the plaintiff's wife took a vested interest in the fund, as personal property, which passed to her representatives.

We feel bound by the authority of these cases, the first was decided by a court by whom our decisions may be revised, the other by a court whose decisions settle the rules of real property in this state, which must be respected as the local law governing the case. 12 Wheat. 161, 162. The interest of Mrs Stockton must therefore be considered as personal property, the only remaining question is, whether on her death, it passed to her husband, or next of kin.

By the common and statute law of England, the husband who survives his wife, becomes entitled to administer on her estate, and to take to himself all her personal property in action as well as possession. If he dies before he has administered, or before he has completed the administration of her estate, and the next of kin to the wife administers, they are trustees for his representatives. 7 Johns. Ch. 244, and cases cited. Whether he succeeds to her property *jure mariti*, or as her next of kin, is not material. He is next of kin by relation of marriage, and takes in consequence of being her husband, and by reason of that relation. 7 Johns. Ch. 246, 247.

Such is the rule under the English statutes of distribution, which have been adopted in this state; Rev. Laws 174, 179; this rule was followed in Fairlie v. Kline, where the money was adjudged to be payable to the husband in his own right. The only difference between that case and this is, the death of the husband; but as all his rights devolve on his personal representative, that circumstance has no effect upon the case.

The bill of the complainant must be dismissed.

FISHER V. RUTHERFORD ET AL.

A suit in equity does not abate by the death of a co-plaintiff or co-defendant. If one plaintiff and one defendant survive, the suit is open for amendment. The averment of citizenship of a party may be added at any stage of the cause, if the amendment is moved for in a reasonable time after the defect is suggested.

If the statute of limitations is pleaded, and plea overruled, it cannot be again put in by the same parties or their privies.

The staleness of a demand, or the want of proper parties, is no objection to amend the bill. Where the refusal to amend will put the plaintiff out of court, and the defendant can avail himself of the matter on which he objects to the amendment, on appeal, the court will allow it.

THE complainants in this suit were originally Samuel R. and Myers Fisher, citizens of Pennsylvania, who in 1795 filed their bill against the respondents, citizens of New Jersey. Their claim was founded on a deed from Jane Waldie, as the heiress at law of Joseph Urmston, conveying to them certain proprietary shares of lands in New Jersey, which had been mortgaged by Urmston in 1720 to certain persons, under whom the defendants claimed.

The bill set forth the title of Urmston, the mortgage, and the various proceedings which took place, until the defendants, or some of them, took possession of the mortgaged premises, took a seat at the board of proprietors in right of Urmston, located and sold large bodies of land, and received large sums of money, more than sufficient to pay the mortgage debt. The object and prayer of the bill was to establish the right of the plaintiffs to one propriety or twenty-fourth part of New Jersey, in right of Urmston, for a discovery and account of all locations made in virtue of his proprietary right, of sales made, moneys received for payment of the balance, a reconveyance, a right to a seat at the board of proprietors, for an injunction against further locations, and general relief. The bill was served on the defendants, who lived in New Jersey, they appeared and pleaded the act of limitations, this plea was overruled in 1799, and the defendants ordered to answer over; from this decision a writ of error was taken to the supreme court, which was quashed. Vide 4 Dall. 22.

In 1802 and 1803 answers were filed by several of the defendants. In 1803 a rule was entered ordering the plaintiffs to give security for

[Fisher v. Rutherford et al.]

costs and staying proceedings; no replication had been filed. Myers Fisher died in 1819, and in 1825 his executors conveyed to Samuel R. Fisher all the interest of the former to the premises in controversy.

Samuel R. Fisher filed a bill of revivor and supplemental bill in 1826, up to which time no proceedings had been had by either party. The defendants, except John Rutherford and John Stephens, had died, and the representatives of some of them lived out of the state.

A demurrer was filed to the bill of revivor, for the following causes.

1. That no cause was shown for discovery.
2. That relief was sought as to one of five proprietary rights; which one is not specified.
3. That the bill does not specify what part of the premises is in the possession of each defendant.
4. That there are necessary parties who are not made defendants, and that the heirs of Myers Fisher are not made plaintiffs.
5. That the defendants are not averred to be citizens of New Jersey.
6. That security for costs has not been given.
7. That the proceedings are prolix, indistinct and expensive.

In 1827 the demurrer was allowed, whereupon the plaintiffs moved to amend their bills. After argument at April term the court held the motion under advisement, in which state the case has remained till the present time, except that security for costs has been given by the plaintiff.

Mr Wall, for the plaintiff.

The suit has never abated, Samuel R. Fisher, one of the original plaintiffs, and John Rutherford and John Stephens, two of the original defendants, are alive; so that there is an existing suit as to those parties. All the rights of Myers Fisher accrued, on his death, to Samuel R. Fisher, as surviving partner, as well as by the operation of the deed of Jane Waldie to them as joint tenants, and the deed from the executors of Myers Fisher, who had power under his will to make the conveyance.

No replication having been filed to the original bill, the cause is not at issue, and is open to amendments.

An original bill may be amended by adding new matter which existed at the time of filing it, or bringing in new parties; the

[Fisher v. Rutherford et al.]

amendments, if allowed, are a part of the original bill, and the whole is one record. Hinde. Ch. Pr. 21.

After a bill is revived, amendments may be made as if the original party had been alive, if the matter had existed in his lifetime. Mitford 62.

Here the important amendment is, the averment of the citizenship of the defendants to have been in New Jersey at the time of filing the bill. That they were so is admitted, but it is contended that for the want of this averment the court have no jurisdiction of the cause, the amendment is therefore indispensable to enable the court to proceed in the cause; but though the averment is not in the record, the cause is not coram non judice, a judgment rendered on it would not be a nullity. 5 Cranch 173. The court has jurisdiction of the case, and whenever the objection is made, it is the common practice to direct the averment to be inserted; 2 Peters 565; so as to an averment of the value of the matter in controversy, though necessary to enable the court to render a judgment, it is but matter of form and may be added after judgment has been arrested. 4 Wash. C. C. Rep. 629.

This is the only amendment to the original bill which is asked for. The amendments proposed to the supplemental bill are only as to introducing other parties, and such as are necessary to conform it to the bill as amended.

The court will not look to the effect of the amendments any further than to be satisfied that they are allowable according to the rules of the court, and will lead to no injustice to the defendants. Whether there are such parties before the court as are necessary for a final decree, is not a material question in the present stage of the cause, it is always open to this objection, which will not be affected by allowing the amendment.

Mr Vanarsdale and Mr Wood, for the defendants.

This is a stale demand, brought thirty-one years after the right of Jane Waldie, under whom plaintiffs' claim had accrued, and they are entitled to no indulgence. The suit was abated, and until it is revived, the bill cannot be amended; 1 Harr. Ch. 126; the order of revival must precede the application to amend; Mit. 62; the bill of revivor must show good cause for reviving, and that a decree can be rendered against the new parties. Coop. Eq. 70. But as the court have no jurisdiction for the want of an averment of citizen-

[Fisher v. Rutherford et al.]

ship, they can make no order in it, but may order it to be stricken from the docket, as was done in 3 Dall. 183; S. P., 4 Mason 435; 2 Cranch 127; 1 Peters's C. C. 220.

The plaintiff has no reason to complain, after the suit abated he had his election to revive or bring a new suit; if he is allowed to amend now, he will bring in parties to answer whose ancestors would not be bound to answer if alive. He will revive the suit after it has been abated as to some of the parties twenty-two years, when his only excuse for the delay is, not having complied with the rule for security for costs. This is a hardship on those now sought to be made parties, as they could not move to hasten the cause, while the suit remained abated. They had a right to presume the suit abandoned, when no replication was filed for more than twenty years after the answer put in. There has been such gross laches, that the court will not sustain a bill of revivor, or a supplemental bill, otherwise all the evils against which the statute of limitation was intended to guard will be let in, and we may show that the statute is a bar to the bill of revivor, though it would not be to the original bill; 1 P. Wms. 744; Hollingshead's Case, Mit. 235; and this after a decree to account. A bill of revivor must be brought within six years after the suit abates, if an account is prayed for, as courts of equity will not sustain a bill in any case where there has been laches in prosecuting the claim; if not accounted for, the lapse of time is good ground for dismissing the bill. 3 Johns. Ch. 586. A mortgage cannot be redeemed after twenty years' possession by the mortgagee; 2 Sch. & Lef. 636; the party seeking relief must do it promptly; 1 V. & Beam. 246; stale demands will not be enforced; Jeremy 548; 18 Ves. 196, 286, 180; 2 Vern. 276; 3 Mas. 161; 2 Ves. Sen. 400; 2 Eden 169; nor an amendment be allowed after great delay; 4 Price 325; 3 Anstr. 807; S. P., 10 Wheat. 168.

This is not only a stale, but a hard, ungracious claim, on which a court of equity will act on the same principle as courts of law, in refusing amendments in penal or hard actions, where there has been delay; 6 Durnf. & East 171; 8 Durnf. & East 30; or in qui tam actions; 2 Durnf. & East 707; 4 Durnf. 228.

There can be no decree in this case for the want of proper parties; the personal representatives of the mortgagee, and the assignees of the mortgage must be parties. 2 Freem. 59, pl. 66, 180, pl. 245; 2 Atk. 235; 3 Mason 385; 4 Pet. 202; the heir also must be a

[Fisher v. Rutherford et al.]

party; Coop. Eq. 146, 246; if one tenant in common dies, his heirs must be made parties. 11 Ves. 312.

The want of proper parties is an objection to the jurisdiction of the court, which must be met whenever the question occurs. 2 Dall. 368. Jurisdiction depends on the residence of the parties when the suit is brought. 9 Wheat. 539; 2 Pet. 556, 565. In this case there were parties in interest residing in New York, who are necessary parties; 3 Cranch 267; 6 Wheat. 450; 5 Johns. Ch. 303; but cannot be brought within the jurisdiction of the court; the consequence of which is, that the bill cannot be sustained, though it is amended according to the plaintiff's motion. This is a fatal objection to the bill, existing when it was filed, which cannot be cured. 1 Ves. Sen. 446. This court cannot proceed against a citizen of New York in any way, as he cannot be brought in by publication or notice. Vide 2 Pet. 482. If the case cannot be completely decided between the litigant parties, on account of a person, whom the process of the court cannot reach, being a party in interest, the court cannot make a decree. 10 Wheat. 167, 168. So if there is a joint interest in such party, and a party to the suit, the court have no jurisdiction; 3 Wheat. 593, 594; S. P., 7 Cranch 69, 98; the record shows, this to be the situation of the defendants to the original bill, the court therefore cannot act upon the case.

BY THE COURT.—It has been made a ground of objection to the motion to amend the original bill, that the suit has abated, and must be revived before the bill can be amended, but this objection is not sustained in point of fact. One of the original plaintiffs is alive, in whom the rights of both unite, as well by survivorship as by a conveyance from the executors of the deceased party. Two of the original defendants are also alive, there is therefore a cause in court between original parties, pending and open on the pleadings without an issue, so that the object of the bill of revivor is not to make a new suit, but to add other parties to one which has never abated.

The demurrer to the bill of revivor and supplemental bill, pointed to a fatal objection to the jurisdiction of the court over the cause, inasmuch as there was no averment of the citizenship of the defendants in the original bill. As this is an objection always open, and conclusive against any action of the court after it is made, the cause will be *coram non judice*, unless it can be made to appear on the record that the defendants are citizens of New Jersey. The conse-

[Fisher v. Rutherford et al.]

quence therefore of sustaining this objection must be, that if there can be no amendment without revival, there can be no revival without amendment, as there will be no proceeding over which the court can exercise jurisdiction. The judgment on the demurrer is not final; had it been in favour of the plaintiff, the defendant would have been ordered to answer over, or plead to the bills, and after a judgment against him, the plaintiff may amend at any time. Where judgment was arrested for the want of jurisdiction in not averring the value of the property in controversy, the plaintiff was permitted to amend by adding the averment. *Lessee of Lanning v. Dolph*, 4 Wash. C. C. 629. It is the common practice to amend by inserting the averment of citizenship of parties, wherever the want of it is suggested. *Connelly v. Taylor*, 2 Peters 565. The averment of value and citizenship are both indispensable to the jurisdiction of the court, yet are mere matters of form, as regards the merits of the case, and will be added, if true, in point of fact. Though the averment is not in the record, and the judgment would be reversed on error, yet it would not be a nullity to be avoided collaterally; *Kemp v. Kennedy*, 5 Cranch 173; it is too late to object to the jurisdiction after an affirmance in the supreme court and a mandate for execution; *Skillern v. May*, 2 Cranch 264; so if all parties are aliens, the court may sustain jurisdiction, if no objection is made. *Mason v. Blaireau*, 2 Cranch 264.

In this case, there is jurisdiction in fact, as the defendants are citizens of New Jersey, the amendment is no surprise to them, and is in fact mere form, so considered by all parties who, with knowledge of the defect, and the decisions of the supreme court, have suffered the cause to remain in its original form from 1795 till 1826, without suggesting any want of jurisdiction.

It has been objected that the act of limitations has barred the plaintiff of all remedy, so as to prevent the court from affording him any aid in the prosecution of this suit, but so far as respects the matter in the original bill, the judgment of the court on the plea of the statute heretofore filed by the defendants, is conclusive on the parties who pleaded it and their privies. -They cannot again set up the same matter as a bar, though it may be done by new parties (not privies to the parties who made the plea) to the original, the supplemental, or bill of revival; as to them the case will be open to all objections arising from any statutory limitation, any rule of equity adopted by analogy, or the staleness of the demand. But in the

[Fisher v. Rutherford et al.]

present stage of the case, we cannot yield to either objection, when made on a collateral question of amendment; they apply to the merits of the cause on a final hearing, or on plea or demurrer, not to a motion to so amend the record as to give the court jurisdiction to hear and determine the merits in some way.

By allowing the amendments, nothing is decided against the defendants; the original bill is not revived or new parties added, all questions as to the right of the plaintiff to revive, or whether there are proper parties to the suit, remain open; parties may be added after the reversal of a final decree, and the cause remanded to the circuit court. *Russell v. Clark*, 7 Cranch 99; *Caldwell v. Taggart*, 4 Peters 190. It is therefore premature, to now decide upon any matter affecting the right to revive, or as to proper parties, till the court shall have the power to decide these questions on a proper record.

A refusal to amend, is fatal to the plaintiff's case without the right of appeal; the supreme court cannot review a motion to amend which rests in the discretion of this court, whereas an appeal would lie on our final decree against him, upon any of the grounds of objection now made to the proposed amendments. It would be hard to place him in this predicament, that he would be debarred of any appeal by our decision on any of the collateral questions which have been made in the argument, while all would be open to the defendant after a final decree.

The staleness of the demand has been much insisted on, as a reason for refusing the amendments, but we cannot permit it to prevail. If the lapse of time brings the case, in our opinion, within the act of limitation, we cannot reverse the former judgment of this court; if it does not, then the staleness of the demand cannot be so palpable at the first blush, as to authorize us to throw the plaintiff out of court for this cause on a motion to amend. The judgment on the plea of the statute, is yet open to revision by the supreme court after our decree on the merits, and if we differed from our predecessors on that point, it would be but a decent respect to their memories to leave the question open.

There is, however, one question arising from the lapse of time, on which it is proper to give an opinion, that is, whether the motion to amend was not too late in 1827. This objection would have been a good one, if the plaintiff had delayed making the motion to amend an unreasonable time after the want of jurisdiction had been pleaded

[Fisher v. Rutherford et al.]

or suggested. It escaped the attention of all parties for more than thirty years after the commencement of the suit, when the defendants assigned it as one of the causes of demurrer; the present motion was made immediately after the judgment of the court, and was in due time. We are therefore of opinion, that the plaintiffs have a right to make the proposed amendments, according to the established principles of courts both of common law and equity, and that we are bound to allow them by the provisions of the thirty-second section of the judiciary act "in order to enable us to proceed and give judgment according to the right of the case."

Amendment allowed.

LESSEE OF WESTBROOKE V. ROMEYN.

A, by deed, in 1766 conveyed the premises in question to his son M, and the heirs of his body lawfully begotten, and in default of such issue to the surviving sons and daughters of A, in the following shares and proportions; two shares to a son and one share to a daughter, and the heirs of their bodies respectively: and in case either of the sons or daughters die without issue, their shares to go to the survivors in the same proportions, and in default of issue of the survivors, to the right heirs of A. A had four sons and three daughters who survived him; they all died before M except one daughter. M died without issue in 1818, leaving a sister (the mother of the defendant), who survived him. Held, that the plaintiff, a son of a deceased brother of M, was not entitled to any share of the estate, his father having died before M.

The remainder to the surviving sons and daughters of A was contingent, the words of survivorship referring to the death of M without issue.

Whether the right heirs of A were entitled to any part, *Quære*.

THE cause came before the court on the following case stated by counsel.

1. Abraham Van Campen, Esq., the maternal grandfather of the defendant, by deed of gift, bearing date on the 26th day of November, A. D. 1766, conveyed, amongst other lands, the premises in question to his son Moses Van Campen, with the following habendum clause, that is to say: "To have and to hold the said mesuage, plantation, and the several tracts or pieces of land above described, hereditaments and premises hereby granted or mentioned so to be, with the appurtenances, unto the said Moses Van Campen, and to the heirs of his body lawfully begotten or to be begotten; and in default of such issue, then to the surviving sons and daughters of the said Abraham Van Campen, Esq. in the following shares and proportions, namely, to a son two shares, and to a daughter one share, and to the heirs of their bodies lawfully begotten or to be begotten, respectively; and in case any or either of the said sons or daughters of the said Abraham Van Campen, Esq. shall die without legal issue, then their share or shares, proportion or proportions, to go to the survivors and their heirs, in the manner, shares and proportions aforesaid; and in default of issue in them, the said surviving sons and daughters of the said Abraham Van Campen, Esq., then to the right heirs of the said Abraham Van Campen, Esq. for ever."

2. That the said Abraham Van Campen, Esq. had three other

[Lessee of Westbrooke v. Romeyn.]

sons, to wit: Abraham, John and Benjamin, to whom he gave lands, by like deeds of gifts, at the same time and with the same habendum clause as in the above deed to his son Moses.

3. That the said Abraham Van Campen, Esq. also left three daughters, and that the said Abraham Van Campen died, leaving the said four sons and three daughters him surviving.

4. That the said Moses Van Campen died in the month of July, A. D. 1818, without issue.

5. That at the death of Moses Van Campen, the sons and daughters of the said Abraham Van Campen, Esq. were all dead, except one daughter, Susan Romeyn, the mother of the defendant.

6. That the other two daughters of Abraham Van Campen, Esq. died in the lifetime of Moses Van Campen, each leaving children, who are now living.

7. That Benjamin, the son of Abraham, died in the lifetime of Moses, without issue.

8. That Abraham and John, the sons of Abraham, died in the lifetime of Moses, each leaving children, who are now living.

9. That the lessors of the plaintiff are the children of John, the son of Abraham Van Campen, Esq.

10. That the said Susan Romeyn, the mother of the defendant, died before the commencement of this action, leaving the defendant her eldest son, and other children.

It is agreed by the parties, that if, upon the foregoing statements of facts, the court are of opinion that the plaintiff is entitled to recover the premises in question, that judgment shall be rendered for the plaintiff, with costs; and if the court shall be of opinion that the defendant is entitled to hold the premises in question, that then judgment shall be rendered for the defendant, with costs, with liberty in either party to turn this case into a special verdict, for the purpose and benefit of a writ of error.

Mr Frelinghuysen, for the plaintiff.

It was evidently the intention of the donor to give the estate in question to his sons and daughters who survived him, in case Moses died without issue; he created an estate tail in Moses, which on his death devolved on the other children of the donor, without regard to their surviving Moses; provided they survived the donor, their issue take by descent in right of their parents, who had a vested remainder in tail.

[Lessee of Westbrooke v. Romeyn.]

It is a fundamental rule that, in the creation of estates tail, the intention of the donor shall govern, whether the estate is created by deed or will. 7 Co. 137.

The term *survivor*, or *surviving*, is not a technical term of fixed legal signification, but is to be taken subject to sound rules of construction, applied to all instruments, according to the subject matter and the sense in which they are used by the maker. If the time of survivorship is not definite, it will be referred to such time as, from a view of the whole instrument, shall appear to best comport with the intention, and the particular expression will be taken to have a meaning consistent with the context and other parts of the instrument.

Thus a devise to *surviving* children will be construed to mean *other* children, when such appears to be the intent of the testator; and the word *survivor* will be referred to the death of the testator, rather than to the death of the first taker, or the expiration of the particular estate on which the remainder is limited; Roebuck v. Dean, 2 Ves. Sen. 265; Wilmot v. Wilmot, 8 Ves. 10; Barlow v. Salkeld, 17 Ves. 478; Drayton v. Drayton, 1 Dess. 324, 331; Perrywood v. Cooke, Cro. Eliz. 52; so the word "or" will be construed "and" to effect the intent. White v. Crawford, 10 Mass. 189. There is no distinction between deeds and wills on this subject, the intention of the donor shall prevail, when it violates no rule of law, and the court will supply words of grant which are omitted in a deed when there is an habendum; Bridge v. Willington, 1 Mass. 219; so where a grant is made *in futuro*, which could not operate as a deed, the court construed it as a covenant to stand seised. Wallis v. Wallis, 4 Mass. 135.

Here there was an apparent intention to provide for his grandchildren, as the issue of the sons and daughters who should survive him; they had a capacity to take the remainder on the death of Moses without issue, and a vested interest transmissible to their children.

The case of the plural terms "sons" and "daughters" shows that the donor did not mean to confine the gift to one only, who should survive Moses, but to divide it among all his other children as tenants in common, which import partition, and shall control words of survivorship so as to refer them to the death of the testator, and thereby preserve the tenancy in common; Russell v. Long, 4 Ves. 551; "ut res magis valeat quam pereat."

[Lessee of Westbrooke v. Romeyn.]

By referring the survivorship in this case to the date of the deed, or the death of the donor, there is a vested remainder in tail in his children, which is not defeated by the death of any of them before the happening of the contingency on which it was to vest in possession. 10 Mod. 419; 1 Str. 139; 2 Wils. 29.

Mr Williamson and Mr Wood, for defendant.

Where a remainder is limited to a determinate person, who has a present capacity to take, and is ascertained before the contingency happens, the remainder is vested; but if the remainder is limited to a person not ascertained before the contingency, he can have no present capacity to take, and the remainder is necessarily contingent.

Here an estate tail is given to Moses, with remainder to the surviving sons and daughters of the donor, who cannot be ascertained till his death. Though the word survivor is not a technical term, it has a definite meaning, outliving another, as it here means those who outlive Moses.

This is the general rule, to which there are exceptions, where the manifest intention of the will indicates a different meaning, and in cases where a different construction is necessary to preserve a tenancy in common, created in another part of the will, or to prevent a lapse by the death of the devisee in the lifetime of the first taker. Then the survivorship is referred to the death of the testator, otherwise it is referred to the period of enjoyment and distribution, at the expiration of the particular estate on which it is limited. 2 Ves. 265; 4 Ves. 551; Daniel v. Daniel, 6 Ves. 297; Tenaure v. Tenaure, 10 Ves. 562.

There must be a special intention to refer the survivorship to the death of the testator, or a direct and immediate gift to take effect in interest, and the possession only postponed where no previous interest is given in the thing devised. Krips v. Woodford, 4 Madd. 10, 14; Davidson v. Dallas, 14 Ves. 576. In this case there can be no lapse, as the estate passed by a deed which took effect by delivery of the donor; there was no direct or immediate gift to the other sons, the enjoyment of which was suspended during the life of Moses, or which could be defeated by referring the survivorship to his death; and there was a previous interest given to him in the thing granted: nor is there any special intent to be inferred from any part of the deed, to justify a departure from its plain words. Dormer v. Parkhurst, 3 Atk. 136.

[Lessee of Westbrooke v. Romeyn.]

The plaintiffs, being the grandchildren of the donor, are not entitled by the terms "sons" and "daughters;" there is no intention to provide for them in any way, expressed or to be implied; on the contrary, the intent is apparent, to provide only for the living children at the death of Moses.

The limitation to his right heirs on the death of his sons and daughters, shows the intent that his grandchildren shall take only in that event, and were not included in the first clause. The time when the estate is to vest in the survivors is clearly the death of Moses; "then" it is to go to those who outlive him. Such is the settled construction of the word "then;" it relates to the last antecedent—to the death of the first taker, and not to the date of the deed or the death of the donor. 3 Halstead 29, 39; Middlesworth v. Schenck, 12 Wheat. 153; Jackson v. Chew, 1 P. Wms 534; Hughes v. Sayre, Fearne 358.

To come within the description of persons entitled to this remainder, the plaintiff must be a son or daughter of the donor who outlives Moses, he must fill the character both of *son* and *survivor*, before any interest can vest; but the plaintiffs filled neither character, nor could their father be the survivor of Moses, when he died before him. The remainder was necessarily contingent, till some one could fill that character, and could never vest till the contingency happened, for till then no one could have a present capacity to take.

As the defendant survived all her brothers, she is entitled to take the whole; the use of the words sons and daughters in the plural makes no difference. Fearne on C. R. 239, 312; 1 Sho. 91.

Where property is given to a class or description of persons, and there is one who comes within the description, he takes the whole. Stewart v. Sheffield, 13 East 526, 533; Jackson v. Blanch, 3 Johns. R. 392; Denn v. Crawford, 3 Halstead 99, 100. But it is immaterial whether the defendant is entitled as sole survivor or not; as the plaintiffs have shown no title in themselves, there must be judgment for defendant.

The opinion of the Court was delivered by BALDWIN, J.

It is admitted, and cannot be doubted, that an estate tail was vested in Moses Van Campen. The only question is, whether any interest passed on his death without issue to the children of his brothers who died before him, or whether the whole estate vested in his sister, who survived him.

[Lessee of Westbrooke v. Romeyn.]

1. Taking the words of the deed in their plain, obvious meaning, without regard to their legal signification, there would be no difficulty in understanding them. The plaintiffs are not sons or daughters of the donor, they cannot therefore take as the persons referred to and described as such: if they take, they must take by descent from their father, an estate which was vested in him in his lifetime, so as to be transmissible to his children by the act of the law. The words of the deed direct, that the estate shall go to the surviving sons and daughters, on the death of Moses without issue; the word "*them*" denotes the time when the interest vests in them to be at his death, as well as the persons to take, that is, those who shall then be the survivors of Moses.

The mode of division, is also a clear indication that no provision could be made for grandchildren; the sons were to have two shares, and the daughters one share, and the next limitation is of the same nature, "if any of the said sons or daughters shall die without lawful issue, their shares to go to the survivors in the same manner and proportions." The limitation over to the right heirs of the donor, is also on the death of all the surviving sons and daughters, which must mean those who survive Moses in the first place, and next those who survive each other. In thus passing the estate from Moses to all the survivors, from survivor to survivor, and from the last survivor to the right heirs of the donor, there is no limitation in favour of the descendents of any son or daughter, until the death of all without issue. To prevent the estate from going to the right heirs, there must be in existence the issue of a surviving son or daughter of the donor; the issue of one who did not survive some one, could not prevent the right heirs from taking. As the estate passed by deed, it took effect by delivery, and would have vested in the sons and daughters who survived Moses, though they had all died in the lifetime of the donor. Had it been his intention to refer the survivorship to his own death, or to give an interest after the death of Moses to all his children who were alive at the delivery of the deed, or the donor's death, he would have omitted the word "surviving." But as he has used it in the three limitations, first, on the death of Moses, second, on the death of any survivor, and third, on the death of all the survivors, it is obvious that it was intended to have its well understood and natural meaning, and apply to those sons and daughters who should outlive or survive Moses. To give it any other meaning, would be in effect to erase it from the

[Lessee of Westbrooke v. Romeyn.]

deed, as no other period of division is in any manner referred to in the deed, and no words or expression used which denote any intention of the donor that the estate should vest in interest before the death of Moses, to be enjoyed afterwards. Were we to substitute *other* for *surviving*, it would be going further in a court of law in a deed, than courts of equity have done in a will; such substitution is made only where the plain intention of the testator, or some other provision of the will would be defeated, by giving the words their natural meaning. As a general rule, words of survivorship relate to the time or event when the thing devised is to be distributed or enjoyed, and not to the time when the will took effect by the testator's death. Their reference to the latter period, is to effectuate some special intent, to preserve an estate previously given, or to prevent a lapse, which are exceptions to the rule; but none of them exist in the present case, and were it the will of Mr Van Campen, we could not, consistently with the rules of courts of equity, give it the construction contended for by the plaintiff's counsel. 1 Rep. on Leg. 426; vide Lambson v. Boileau, *post*.

The plain effect of the deed is to create an estate tail in Moses, with remainder over to the surviving sons and daughters of the donor; here is a double contingency, the death of Moses without issue, and the survivorship of his brothers and sisters, on the happening of which the remainder depended. Both were uncertain, and must continue so till the death of Moses; and as the only right which could exist was to take the estate when the two contingencies took place, on which alone it depended, the remainder was necessarily contingent.

Till the contingency vested the estate, the remainderman was not ascertained, and no one could fill the description of the donor, so as to be capable of taking a present vested interest, with the right of future enjoyment, till he became the survivor, which could not be till the death of Moses; it was uncertain who could be the survivor, nor could there be a capacity in any one to take during his lifetime, as he might survive all his brothers and sisters.

2. Testing this limitation by the established rules of law, we cannot doubt that the remainder is contingent. "The present capacity of taking effect in possession, if the possession was to become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Fearne 215.

[*Lessee of Westbrook v. Romeyn.*]

“A point common to all limitations of remainders, either by deed or will, and either by the rules of the common law or under limitations of uses, is, that no persons or class of persons can take under a remainder unless such persons or class of persons come in esse, or being in esse shall be capable of taking vested interests, before the determination of the prior particular estate, by which the remainder is supported.” 1 Preston on Est. 59.

The rule cannot be more accurately laid down than in the words of a distinguished jurist. “In every vested remainder the capacity to take the possession arises before the right to take it. That capacity exists as soon as there is a person in esse who meets the description of the remainderman, and nothing is interposed between him and the possession except the particular estate, while the right to take it is yet in suspense, till the determination of the particular estate. And as soon as a remainderman is presented who meets the description of the limitation, and between whom and the possession nothing stands but the particular estate, the remainder vests in interest, though it may chance never to come into possession.” Mr Wirt *arguendo*, 4 Pet. 62.

As the father of the plaintiffs died in the lifetime of Moses, he did not meet the description of the limitation as a survivor, which was the only character in which he could have any capacity to take a vested interest. The terms of the limitation required that, on the death of Moses without issue, there should be a son or daughter of the donor in esse, to meet the description of the remainderman; we cannot so construe the deed as to make a deceased brother a surviving one.

3. If we felt at liberty so to construe this limitation as to give a vested remainder in tail to all the children of the donor who survived him, the other limitations would prevent our doing so. The donor has carried on the whole estate in remainder, from survivor to survivor, and on the death of all his surviving children, has limited it to his right heirs; these limitations will be defeated, if any part of the estate goes to the children of those who did not survive the contingency on which it was to be divided or carried over.

Taking the limitations of the will in their legal acceptation, we are therefore clearly of opinion that there was no vested interest in those who died before Moses, for the want of a capacity to take a vested remainder.

There are no words in this deed from which a shifting or spring-

[Lessee of Westbrooke v. Romeyn.]

ing use can be raised in favour of the plaintiffs; this could be done only after the first limitation had expired, for the want of persons capable of taking under it, and in order to preserve the estate. For where an estate can take effect as a remainder; a springing use will not be raised, nor can there be such a use in one part, and a remainder in the other. Here the whole estate could, and did vest as a remainder in the survivor, by the happening of the event on which it was limited, and no part of it can be shifted to the plaintiffs, either by right of descent or as purchasers under the deed.

All the limitations to the survivors are in tail, the word issue is, throughout, used as a word of limitation, denoting the quantity of estate given, not the person to take, either by name, description or descriptive designation, so as to afford the least ground for considering the plaintiffs as purchasers. If they could take in any event, it must be by descent, but as no interest was vested in John Van Campen, their father, they can recover nothing.

It has been contended, that as Mrs Romeyn was the sole survivor, she could not take the whole estate; but as the plaintiffs are not the right heirs, or heirs at law, of the donor, it can make their case no better, though the last limitation over to the right heirs may have taken effect, as the plaintiff must recover on the strength of their own title.

We are happy in this case in being able to concur with the late learned chancellor of this state in his opinion on this deed; we should have departed from it only in obedience to higher obligations, our duty as well as inclination being at all times to conform to the course of adjudication in state courts, unless they are clearly opposed to the settled rules of law.

Judgment must be entered for the defendant.

BONAPARTE V. THE CAMDEN AND AMBOY RAIL ROAD COMPANY.

An alien resident in New Jersey, who holds land under a special law of that state, may sustain a suit in the circuit court relating to such land. The agents of a corporation may be sued in this court, though the corporation are not suable here.

General cases for granting injunctions.

It is no objection to an injunction that the defendant acts under the authority of a law, if he exceeds or abuses his power, or if the law is unconstitutional. But it will not be granted if there is a reasonable doubt of the validity of the law or the proper exercise of the power it confers; nor where there is a discretionary power given and exercised with judgment, and within the line prescribed; a party complaining will be referred to his remedy at law, or the special tribunal created by the law which gives the authority to do the act.

An act of New Jersey incorporating a company to make a rail road, providing for the assessment of damages to the owners of land through which it passes, is not unconstitutional.

The right to take private property for public use, is unincident to all governments; but the obligation to make compensation is concomitant.

Though a law divesting vested rights, is not, *per se*, void, it is so if the right is by a contract, and compensation is not provided or made.

The constitution protects property against arbitrary seizure or divestiture; not by legal process and on compensation made.

The legislature may prescribe the process of taking property for the public use; also the mode of ascertaining compensation without trial by jury.

The twenty-second article, securing the right of trial by jury, applies only to criminal cases, and civil cases where a right is to be tried at law; not to mere collateral questions of damages, where no suit is pending, and the right of both parties admitted.

A law cannot authorize the taking private property for any other than public use. What are public and private corporations?

A road, canal, &c., is for public use, when the public have a right of passage on paying a stipulated, reasonable, and uniform toll, whether it is constructed by the state or corporation. But if the toll amounts to a prohibition, it is a monopoly and the road is not public.

The declaration in the charter, that the Camden and Amboy Rail Road is a public one, does not make it so, if the effect of the charter is to give the exclusive use to the corporation.

If it is not clear that the use is private, an injunction will not be granted.

Under a charter to construct a rail road from Camden to Amboy, with liberty to make a lateral road to Bordentown, and no route designated between Camden and Amboy, an injunction will not be granted, merely because the main road goes through Bordentown. The corporation must confine themselves to the route prescribed, but if there is a discretion not clearly abused, the court will not interfere by an injunction.

If the corporation has encroached on any public right at Bordentown, or usurped a franchise at a place not authorized by the charter, it is a proper case for the state to interfere by indictment or quo warranto in a state court. But an individual is not

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

entitled to an injunction against the taking his land for the road, if by any reasonable construction of the charter, there is a power to locate the road through it.

Where the charter authorises an entry on land for the purpose of locating the road, and directs the location to be made, and a survey of the route of the road to be deposited in the office of the secretary of state ; and when the location is determined on and the survey so deposited, the corporation may take possession of such land, use and occupy it for the *construction* of the road. The location, and deposit of the survey, are conditions precedent to their authority to enter for the purpose of constructing, and their entry for such purpose is a proper subject for an injunction, if the condition is not performed. An entry on private property, for the mere purpose of locating a road, is not taking it, this power may be given by law without compensation other than for any injury done to it, as the right remains in the owner. But where the divestiture of the owner's right is claimed, and its transfer is necessary for public use by a permanent appropriation of the soil, compensation must be made.

A law which directs the taking private property for public use, is not void because it contains no provision for compensation, or the mode of ascertaining it, the law is valid if this is done by a subsequent law.

But the execution of the law will be enjoined, till such provision is made by law, and the compensation paid.

The payment must be simultaneous with the disseisin of the owner, and the appropriation of his property. The owner must not be put to his remedy. But *semb.*, if the compensation is ascertained, its payment certain, the security undoubted, and the means of collection summary, the construction of the road may be *begun* before actual payment.

The kind of injury impending, and the degree of its danger as a ground for an injunction, considered.

This case a proper one for an injunction.

IN equity on a motion for an injunction on bill and answer.

The bill set forth that the complainant was an alien, that in virtue of a special law of New Jersey, he was enabled to hold land in the state, and had purchased two thousand acres of land adjoining Bordentown, whereon he had made extensive and valuable improvements, at an expense of three hundred thousand dollars, and where he had resided for many years. That the improvements consist of valuable buildings, a park, pleasure grounds, embankments, roads, walks, a lake, gardens, and other works combining utility with ornament, in the enjoyment and possession of which he has been disturbed by the defendants, their officers and agents. That under colour of an act of assembly, incorporating said company for making a rail road from Camden to Amboy, they have entered upon the land of complainant, laid out and staked a road on and over the park, embankments, wharves and roads thereon, which, if constructed and completed as marked, will be to his irreparable injury.

That the defendants have collected materials and workmen to commence the construction of said road, and through the premises, by taking possession thereof, and using the materials thereon found,

[Bonaparte v. The Camden and Amboy Rail Road Company.]

have commenced excavations thereon, and threaten to proceed and complete the construction of the same, without consent of the complainant, or making him any compensation for the injury he will sustain before the road is finished.

The bill then recites various objections to the validity of the act of incorporation, as well as various acts of the defendants, and denies their authority to enter upon his lands, and concludes with a prayer for an injunction.

No affidavit is attached to the bill, but a special one was submitted with it, averring the material facts stated in the bill.

The answer of the defendants admits that a line has been run through the land of complainant, designating the route of the railroad; but denies that any final location has been made. They aver that if the road is constructed as laid out, it will produce no injury to the plaintiff which cannot be compensated in damages; that it is necessary for the objects of the incorporation, that the road should pass through his premises; as it is the best route, they feel it to be their duty to the public and all interested, to locate it according to the report of the engineer of the company, who has reported this as the only practicable route, without an increase of the expense to the amount of 100,000 dollars. They deny that they ever intended to take possession of the premises, without the permission of complainant, due process of law, or just compensation, which they are willing to make.

The answer concludes by objecting to the jurisdiction of the court over the parties, or the subject matter, because there are alien friends who are stockholders in the company and members of the corporation.

In support of this objection, the affidavits of Joseph Billborough and Edwin J. Stevens were read, showing the former to be an alien, resident in Pennsylvania, and owner of one hundred and fifty-five shares in the stock of the company.

The affidavit of William Cook, the assistant engineer of the company, was also read, stating the report of the principal engineer, and his own opinion, that the interest of the public and the company required that the road should be constructed through the complainants premises, and that no irreparable injury would be done thereby.

Mr Wall, for complainant.

1. The act of incorporation is repugnant to the twenty-second ar-

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

ticle of the constitution of New Jersey, which provides, "that the common law of England, as well as so much of the statute law as has heretofore been practised in this colony, shall still remain in force until they shall be altered by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter, *and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal for ever.*"

It is provided by Magna Charta, that no man shall be put out of possession of his freehold lands or franchises, but by the lawful judgment of his equals, or by the law of the land, which is by due course and process of law; 2 Co. Inst. 45, 46. The only lawful mode of taking the land of a subject, without his consent, is by making him a full equivalent, 1 Bl. Comm. 139, which is by a writ of *ad quod damnum* and an inquisition, 1 Jac. Law Dict. 48, and is the process used when public or turnpike roads are laid out on the lands of individuals; 3 Jac. Law Dig. 289, 294; which in England is never taken for public use without compensation awarded by a jury.

The thirteenth section of this law takes away the right of trial by jury, by substituting in its place commissioners to assess damages, whose report is made plenary evidence of the right of the company to the land and materials required for the construction of the road. They are not directed to act according to the rules of the common law on the writ of *A. Q. D.*, which directed a jury to inquire only into the damages sustained, but are authorized also to estimate the benefits accruing from the road, and to strike a balance between the value of the land taken and such benefits. This is manifestly unjust, because by the report the land is absolutely vested in the company, while the benefits of the road are speculative and prospective. Though the fourteenth section professes to give a trial by jury, it is under such restrictions as make the right nugatory; for before it can be had, the court must set aside the report of the commissioners, on cause shown, of the sufficiency of which they judge; it is therefore no longer a matter of right, but of mere discretion. No law of this state can take away a constitutional right; such law is void by the constitution of the state; 4 Halst. 443; S. P., 2 Dall. 304; as a law directing a jury of only six to decide on cases where the sum in controversy did not exceed 25 dollars, which was adjudged void; *Holmes v. Walton*, cited 4 Halst. 444; and the legislature

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

cannot give the power of a jury to commissioners, if they cannot give it to six men as a jury.

2. This is a private company, incorporated for private objects, to whom the legislature cannot give the power of taking private property for their use, which is a monopoly, an exclusive right of passage on the road, unless on conditions which they may make so onerous as to amount to a prohibition in effect. Though the twenty-eighth section of the act declares the road to be a public highway, such declaration does not make it one, if the terms and provisions of the law show it to be one for private emolument rather than public convenience.

3. Before the company can enter upon private property they must have made an equitable assessment of its value, and the compensation must be made before possession is taken; *Gardiner v. The Trustees of Newbergh*, 2 Johns. Ch. Rep. 166; it cannot be left to future adjustment according to the fourteenth section, but must be paid before the construction of the road is commenced, though by the thirteenth section the road may be located before compensation can be demanded.

4. By the thirteenth section of the law, the filing a copy of the survey of the road, as located, in the office of the secretary of state, is made a condition precedent to any right of constructing the road. The bill charges, and the answer admits, that this has not been done, which is a sufficient ground for an injunction till the survey is filed.

5. The eleventh section gives no authority to locate or construct the main road at Bordentown; they can only take a lateral road to that place, consequently they cannot locate the main road, as has been done, on the complainant's premises; it is an evasion of the law, annulling its provisions to all intents and purposes. It is obviously the intention and direction of the law, that until the main route was completed, the road should connect with the Delaware river only at the beginning point. The twelfth section, which authorizes the construction of a lateral road, is a proviso to the eleventh, which, as the last expression of the will of the legislature, repeals and controls any part of the eleventh which might imply the same power; it makes the construction of the main route a condition precedent to the construction of the lateral road; *Vide Fitzg. 195*; the company therefore have no power to locate the road to Bordentown till that condition is complied with.

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

6. This is a proper case for an injunction according to the rules of equity, Jeremy 308; it lies for directing a stream of water by virtue of a law, if no provision is made for compensation to the owner, 2 J. C. 162, where there will be an injurious interruption of the enjoyment of property, 2 J. C. 463, 473; and in a case otherwise proper, will be granted against the trustees of a college, turnpike, or canal commissioners, where they abuse, exceed, or deviate from their authority; 1 Ves. Sen. 188; 2 Dow's P. C. 519; or a canal company; Coop. Eq. Rep. 77.

7. On the face of the bill the court has jurisdiction, as it will be presumed that a corporation created by the law of a state is composed of the citizens of the state. *Bank of the United States v. Deveaux*, 5 Cranch 88, 90; 1 Paine 609, 610. The want of jurisdiction must be pleaded, the court will not act on affidavits, but the company are not necessary parties; the agents by whom they act are citizens of the state, are made defendants, and have answered; the non joinder or misjoinder of parties does not affect the jurisdiction of the court, they can enjoin their agents; 1 Paine 410; 8 Wheat. 421; 10 Wheat. 181; so the agents of a state, though the state is not suable; 9 Wheat. 733.

Mr Sloan and Mr Wood, for defendants.

1. The plaintiff being an alien, holding land by a special act of the legislature, has no right but what is common to all the citizens of the state; consequently cannot sue one in the courts of the United States. If, however, he could sue a citizen, he cannot sue a corporation, one of the members of which is an alien, for this court has no jurisdiction in a case where both parties are aliens. 5 Cranch 303. All the plaintiffs are one party, all the defendants the other, and each must be capable of suing and being sued; if a corporation is sued, all the members must be averred to be citizens. 5 Cranch 85, &c.; 4 Wash. 594. It is not sufficient that Stephens and Sloan, the agents of the company, are citizens, if they have no interest. In the case of *Osborne*, 9 Wheat. 733, the court enjoined the agent, because the state could not be sued, and the law under which the agents acted being void, they were considered as principals. Here all the members of the company have a joint interest, claiming a joint right; they must therefore all be made parties, and the court cannot proceed against those who are agents without affecting the rights of all.

2. The twenty-second article of the constitution applies only to

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

the right of jury trial in criminal cases, and suits between individuals, not to cases where public convenience requires that private property should be taken for public use. Before its adoption, the colonial legislature directed damages caused by roads to be assessed by commissioners, it was the common mode of ascertaining compensation before the revolution, *Leam. & Spicer* 440; *Allison* 274; since the adoption of the constitution, the legislature have acted in both ways at their discretion, they have directed the valuation by commissioners, or by an inquest, at their pleasure. In the cases of *Dorsey v. The Morris Canal Company*, and *certain land owners v. the same*, the chancellor decided, that the law providing for the assessment of damages by commissioners was valid, and no contrary decision has ever been had in the state. It is enough that an impartial tribunal is appointed, commissioners act as arbitrators appointed by the court; the owner of the land is not bound by their award, which the court may set aside if illegal, and if the thirteenth section is unconstitutional, all proceedings under it will be annulled, and the owner will then have a trial by jury.

The plaintiff holds his land subject to requisitions by the state for public use, the right to take it is recognised by the fifth amendment to the constitution of the United States, provided just compensation is made; but the legislature may prescribe the mode of ascertaining it, and this amendment, as well as the constitution of the state, must be construed with a reference to the previously established practice. Neither the proprietary or state government, made any compensation to the owners of land through which public roads were laid out, as five per cent was allowed by the proprietors in all grants for that purpose. Compensation was first allowed, when companies were incorporated to make roads; this was in the power of the legislature, and when a road is so made, it is as much a public road for public use, as if made by the state. 20 Johns. R. 743. The twenty-eighth section declares this to be a public highway, and its termini and route show it to be a most important part of a great national communication, important to the whole country. Besides, the state has a present right to become owners of one-fourth of the stock, and a reversionary right to purchase the road after thirty years, and they have a revenue from the tolls, which the defendants swear will amount to ten thousand dollars a year.

The provision that the commissioners shall deduct the benefits of the road from the damages it occasions, is neither unconstitutional

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

or unjust ; both items necessarily enter into the question of damages, all that is required is, that the compensation shall be just, equitable, and reasonable. 3 Mass. 310 ; 5 Mass. 435 ; 9 Mass. 388 ; 1 Pick. 425.

This is not the tortious taking of property, it is done by the supreme power of the state for public benefit, to which each ought to make a common contribution, and no one ought to receive a compensation exceeding the injury he has actually sustained. In ascertaining its amount, the legislature were not bound to adopt the mode in use in England ; but the plaintiff's counsel are mistaken in taking it for granted, that it is by an *ad quod damnum*, that writ is used only where the king creates a franchise, or gives a license to exercise one, 1 Jac. Law Dic. 48, 49. It is not used where private property is taken by the authority of an act of parliament, vide 2 Dow. 519, &c., it is done by commissioners. The meaning of Magna Charta is not that there shall be a trial by jury, when the exigencies of the public require that private property shall be taken for public use, it only provides, that it shall not be taken without legal process or due course of law, which the legislature is competent to prescribe. The same provision is contained in the fifth amendment to the constitution of the United States : "no person shall be deprived of property without due process of law ;" this and the next clause were intended to guard against arbitrary seizures of property without a proceeding according to law and just compensation.

3. It is admitted that the company are bound to make just compensation, but assert their right to take the property before it is made ; from the nature of this right, it must precede the obligation. But though this is claimed as a right, the defendants in their answer disclaim its exercise, averring their intention to be to make compensation before taking possession of complainant's property. His affidavit does not aver the contrary, and the court cannot grant the injunction till an attempt is made to take possession. The law gives complainant ample security, as he has a lien on the whole property of the company, on the filing the report of the commissioners, as well as a summary remedy to enforce payment, which satisfies every reasonable demand of the owner, as the lien for damages attaches the moment the right to the land passes to the company. This too is the natural order of proceeding, the land is first taken, in doing which the company are not trespassers, as they enter by authority of law,

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

20 Johns. Rep. 744; 3 Mass. 310; the damages are then assessed, and process goes out to collect them.

4. It is admitted that the survey has not been deposited as directed by law, but the defendants aver in their answer, that the delay was from a desire to consult with and accommodate the complainant; it is not for him to allege this as a ground for an injunction, nor is it a ground for the interference of the court, being a mere matter of irregularity, the omission does not make the company or their agents trespassers, 20 Johns. Rep. 743, or afford any ground for arresting the progress of the work.

5. The law does not prescribe the route of the road, it only designates the beginning points, leaving the intermediate route to be located according to the discretion of the company; in such case the court cannot control its exercise, if the proceeding has been in good faith, and within the authority conferred by the law, or affix any limitations not imposed by the legislature. A power to construct a road from one place to another, gives a discretionary power as to the selection of the route; such law must receive a liberal construction, and there must be a clear departure from its directions, before a court can interfere. 10 Johns. Rep. 389.

By the eleventh section a general authority is given to construct the road between the two points, the right to make a lateral road given in the twelfth section is a privilege; the two sections will be so construed as to make them harmonize, and by the words of the law alone. If the company has a colourable right, and the court have a doubt, if there is room to deliberate on the question, whether they have exceeded or abused their power, 4 Johns. Ch. 21, a court of chancery will not interfere by injunction; the case must be referred to the supreme court, which has a prerogative jurisdiction over all corporations, to the same extent as the court of king's bench in England. 2 Johns. Ch. 371, 386; 16 Johns. Rep. 13, 14. An injunction is granted, only in a clear case of the excess or abuse of jurisdiction, of which state courts are the appropriate judges in all cases where questions arise about the extent of the authority given by state laws, or on the local common law. 12 Wheat. 153.

On this subject the answer is full, that the location of the road has been made solely with reference to the public convenience and the benefit of the corporation, according to the best discretion of its officers. The only question which can arise is, whether the company have usurped a franchise on the property of the state, or on a

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

route which they were prohibited by their charter from selecting. This is a question affecting the state alone, as to individuals, the acts of the corporation will be presumed valid, unless the state interferes by indictment for a nuisance, 18 Vesey 622, or their proceedings are declared illegal on a certiorari, or quo warranto in the supreme court of the state. A court of the United States will not interfere, unless there appears to be a clear departure from the authorized route prescribed and defined in the act of incorporation, which is not pretended here.

6. The injury complained of is not a subject matter for an injunction, if it is a trespass there can be full and adequate remedy in damages; the complainant's possession is not disturbed in his mansion-house, improvements, or other parts of his land, he can use them as before. The only injury is taking the ground occupied by the bed of the road, for which full and complete compensation can be made. It is not like the case of a private nuisance by the diversion of a water course, as in 2 Johns. Ch. 162; Eden on Inj. 165, where a trespass has become a nuisance, or where there is a privity, as between landlord and tenant, tenant for life and reversioner. To justify an injunction the injury must be irreparable, or so great as to be destructive of the property to the owner for all the purposes to which he had devoted it, and for which there is no adequate remedy at law. 1 Johns. Ch. 318.

On this subject the answer and affidavits are full to show that the injury is not of such a nature, nor does the complainant aver it in his affidavit. The court will not regard the averments of the bill, but look to the affidavits on both sides; 18 Ves. 622; 1 Swanst. 250; Coop. Eq. Rep. 77; from which it will be apparent, that the only injury will be to pleasure grounds, roads, a park, &c.; whereas, if the injunction is granted, it will interrupt a great public work, produce injuries which can never be repaired, and for which the company can have no redress, as it will have been caused by the act of the court. They will not grant the injunction if they entertain any doubt upon any point in the case.

Mr Wall, in reply.

1. By the eleventh section of the judiciary act, the complainant has a right to sue in the courts of the United States as an alien, of which he cannot be deprived; he is authorized to hold lands in this state, with the same rights of property as any other citizen, he claims

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

no other rights under the law of the state, but is not compelled to renounce such as are given him by the constitution and laws of the United States. By answering, the defendants submit to the jurisdiction of the court, and cannot now object to it as they ought to have pleaded it; 2 Cranch 264; they do not deny their citizenship; the court have jurisdiction of the subject matter of the bill, and over the persons who, as agents of the company, have done and threaten to do the acts complained of; it is not material that the persons for whose benefit the acts are done, are not in court or within its jurisdiction, an injunction against the actors, answers all the objects of the bill. Jurisdiction cannot be ousted by an affidavit, or on the suggestion of a stockholder.

2. Formerly the king could not grant a monopoly without an *ad quod damnum*, now he can do it by a dispensation, with a clause of *non obstante*, this is the meaning in 1 Jac. Law Dic. 48, 49, but he cannot by this authorize the property of a subject to be taken.

In England the general road law directs compensation to be made by a jury, if the owner and surveyor cannot agree on the value of land taken for a road. 13 Geo. 3, ch. 78; 11 Ruff. 850, 851.

The laws of New Jersey relating to public roads, give merely an easement on the lands of individuals, without impairing the right of soil; but when companies are incorporated for making roads, they become owners of the land on which they are located, the owner is disseised and his right divested. The mere subjecting the land to an easement for the public benefit, is very different from granting it to a corporation. It is a fundamental principle, that where government take private property, compensation is made by agreement, as in the case of the Isle of Man, by persons chosen by the parties, or by judicial process, through the intervention of a jury, 2 Dall. 313, and must be paid before the title of the owner is affected. This road is for private use, the charter is for a transportation company, who may charge tolls which amount to a prohibition; unless the public will submit to the exaction of six dollars for each passenger, and four dollars eighty cents for a ton of merchandize, there can be no right of passage; this right excludes all competition by the creation of a monopoly for the benefit of the company, which, of itself, divests the road of every attribute of a public highway. If the power to exact tolls was limited to such as are reasonable and uniform, it might be deemed a public corporation, so as to justify a law to appropriate private property for its use. But the features of the charter are such as

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

stamp it with a private character, and the company must be left to make their contracts with the owners of property through which the road passes.

We have a right to an injunction if the defendants omit any act required by the law, or violate it in any way; they admit that they have neither filed the survey of the road, or made compensation, yet they aver their intention to construct the road, and that they are making preparations to do it. They have exceeded their authority and violated the law by locating the main road on the Delaware, when they could make only a lateral one to it.

We are not bound to wait till the company actually take possession; when they assert their right and avow their intent to do it, the court will restrain them if they are not strictly justified by the law.

The court took time to consider the case, and had met for the purpose of delivering their opinion; as it was about to be read, it was suggested that the parties were about making an adjustment, whereupon the delivery of the opinion was suspended to give them an opportunity of doing it. The parties came to an agreement and the opinion was not read, but as the questions involved were important, and might recur, it is thought proper to publish it.

BALDWIN, J.—The eleventh section of the judiciary act gives jurisdiction to this court, in all cases of a civil nature at common law or in equity; 1 Story 57; the complainant has therefore a right to sue here, independently of any state law. It attaches to his character of an alien, which is admitted in this case, and as he holds his land by the law of this state, it matters not whether it is a general or special one, his right of property gives him the same remedy for its violation, as to an alien residing abroad or a citizen of another state.

Although it may well be doubted whether the alienage of Mr Billborough could be taken advantage of by a mere suggestion in the answer, the same effect will be given to it as to a plea. It is not necessary to inquire, whether it would affect the jurisdiction of the court if the corporation was the only defendant, because Mr Stephens and Mr Sloan, two of the defendants are admitted to be citizens of the state, and competent parties to the suit. The court can take cognizance of the case as to them, though it could not as to the corporation, as has been heretofore decided by this court, *Kirkpatrick v. White*, 4 Wash. 595, 600. These defendants too are mein-

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

bers, directors, and agents of the company for laying out and constructing the road; they act in the name and by the authority of the company, who must be represented by agents, but this gives the agent no exemption from legal responsibility. If they exceed, abuse, or depart from the power given by the law, they are answerable in the same manner as if they acted in their own right, without making the company parties to the suit, if they are not within the jurisdiction of the court, or are exempted from being sued; there is the same remedy against the agent as against the principal, if suable.

The privilege or exemption of the principal, is not communicated to the agent, though the principal is a state which cannot be sued at law or in equity, and the agent a public officer acting in execution of a law of the state, and the subject matter of the suit was money actually in the treasury, in the custody of the defendants for the use of the state; *Bank of the United States v. Osborne*, 9 Wheat. 743, 744. In that case the state was not a party, yet an injunction was awarded. The court, looking only to the illegality of the law by which the money had been obtained, through the instrumentality of the agents of the state, disregarded all considerations relating to the principal, for whose benefit or by whose orders the illegal acts had been committed.

There are then proper parties before the court to enable them to make a final decree, and to enforce it against the agents of the company, if a proper case is made out for an injunction in other respects. The adjudged cases on this subject support this position; 1 Pet. C. C. 317, 320; *Jay v. Wirtz*, 6 Wheat. 559; 8 Wheat. 451; 12 Wheat. 189; 2 Pet. 377; 4 Pet. 203, 204. If we should yield to the objection arising from the alienage of Mr Billborough, it would establish a principle by which a corporation could always elude the justice of the law, by having some shares of the corporate stock held by an alien or a citizen of some other state.

The principles settled by the supreme court in the *Bank v. Osborne* would seem to remove all objections to the power of this court to grant an injunction against persons acting under a law of a state, authorizing the construction of works of public improvement. But the doubt expressed by Judge Washington in 4 Wash. 601, 608, whether a court of equity could treat such acts as a private nuisance, however injuriously it might affect a complainant, is deserving of serious consideration. There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound dis-

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

cretion, or more dangerous in a doubtful case, than the issuing an injunction ; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction : but that will not be awarded in doubtful cases, or new ones, not coming within well established principles ; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act ; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act. We know of no rule which excludes from this process any persons over whom the court has jurisdiction, on account of the character or capacity in which he acts, although it is conferred upon him by a law of a state or of congress.

If the law is unconstitutional, it can give no authority, if the power it confers is abused or exceeded, the person who acts by colour of law merely is a trespasser ; and wherever the court have power to take cognizance of an action of trespass for an offence, a court of equity may, in a case otherwise proper, prevent its commission, as was decided in *Osborne's case*, 9 Wheat. 733. An injunction was granted against the United States by this court, *Armstrong v. The United States*, 1 Pet. C. C. Rep. 46 ; so by the supreme court against the overseers of the poor of a parish, *Terrett v. Taylor*, 9 Cranch 43, 55 ; by chancellor Kent against a corporation, claiming to act in pursuance of a law of the state, *Gardner's Case*, 2 Johns. Ch. 162 ; and in *Belknap v. Belknap*, 2 Johns. Ch. 463, against the inspectors of a corporation for draining marshes. The chancellor cites with approbation the cases in England, where injunctions have been granted against the trustees of a college, 1 Ves. Sen. 188, the commissioners of a turnpike, *Ib.*, a canal company incorporated by act of parliament, *Coop. Eq. Rep.* 77, canal commissioners, 2 Dow's P. C. 519 ; S. P., 1 Sw. 244, 250 ; 4 Johns. Ch. 26 ; 2 Dick. 600 ; Vide 2 Johns. Ch. 376 to 380. In *Jerome v. Ross*, 7 Johns. Ch. 334 ; and *Rogers v. Bradshaw*, this distinguished jurist asserted the same principle, in its application to the commissioners for the construction of the great

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

New York canal, 20 Johns. Rep. 745, as an established rule of courts of equity; to which may be added the declaration of Judge Washington, in 4 Wash. 605.

It must then be taken as settled, that the circumstance of a defendant acting under colour of a law, or as the agent of a corporation for making a road, canal or other improvement, is not of itself a good objection to the granting an injunction. When there is a reasonable doubt whether the law set up as a justification authorises the acts done, it will not be granted; Dick. 600; Coop. 77; or if a discretionary power is given, which is not abused or misapplied, but exercised in good faith, sound discretion, and according to the best judgment of those to whom its execution is confided, the party complaining will be left to his remedy at law. 1 Johns. Ch. 184; 4 Johns. Ch. 352; 7 Johns. Ch. 340; 20 Johns. Rep. 739, 740. The court cannot control them in mere matters of discretion, vide 6 Pet. 739, they must keep strictly within their powers, must not deviate from the line or route prescribed, abuse, misapply, or exceed their authority; when they do so, a court of equity will leave a complaining party to resort to the special tribunal designated by the law, to decide on all questions arising in its execution; but if they act otherwise, the court will proceed in the usual way, by injunction. 2 Dow's P. C. 521, 523.

Having no doubt of our jurisdiction, both of the parties and the subject matter in this case, we proceed to the grounds of the injunction.

1. It is alleged that the act incorporating this company is repugnant to the constitution of the state, in appointing commissioners to ascertain damages instead of a jury.

This is a question of great delicacy and importance, affecting the rights of every man, and perhaps of every government in the union, the constitution of which does not define the mode of making compensation for private property, taken for public use. If the law in this respect is incompatible with the constitution of the state, we must declare it void, and the exercise of any authority under this part of it illegal; but before doing it we must have a clear conviction of the incompatibility between them. 1 Cranch 138; 4 Wheat. 625.

A law of a state, not repugnant to its constitution, is by the thirty-fourth section of the judiciary act made a rule for our decision, in all cases to which it applies, unless the constitution, laws or treaties of the United States otherwise provide.

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

It is a settled principle of American jurisprudence, that the transcendent powers of parliament devolved on the people of the several states by the revolution, 4 Wheat. 651; 8 Wheat. 584; 2 Pet. 656; it necessarily follows, that the only restraint on their legislative power, is that imposed by their own, or the constitution of the United States, 2 Peters 410, 414. That of New Jersey contains no bill of rights, or any other restriction on the legislative power than the twenty-second article which has been referred to; of course its action is uncontrolled, if the right of trial by jury is preserved inviolate in the cases contemplated by the constitution. It is silent on the subject now before us for an obvious reason, it is an incident to the sovereignty of every government, that it may take private property for public use; of the necessity or expediency of which, the government must judge, but the obligation to make just compensation is concomitant with the right. Vatt. 112; Ruth. 43; Burl. 150; Puff. 829; Gro. 333.

This principle of public law is recognised in the fifth amendment to the constitution of the United States, as to the right and obligation, which may be deemed a bill of rights for the people of each state, 6 Cranch 138. Though it may well be doubted whether as a constitutional provision, this applies to the state governments,^(a) yet it is the declaration of what in its nature is the power of all governments, and the right of its citizens; the one to take property, the other to compensation. The obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined it, and exists in this case if the legislature had power to grant the charter to this corporation.

Though the divesting of vested rights of property, is no violation, *per se*, of the constitution of the United States, 2 Peters 412, 413; yet when those rights are vested by a contract, its obligation cannot be impaired by a state law. 6 Cranch 137; 7 Cranch 164; 9 Cranch 45; 4 Wheat. 625. In this case the complainant by his contract of purchase, authorized by the law of the state, comes so far within this protection, that his property cannot be transferred to the defendants without his consent by mere legislative power. To make such transfer valid, it must be an appropriation to a public use, in virtue

(a) Since this opinion was prepared, the supreme court have decided, that this amendment does not apply to the states, but only to the general government. *Barron v. Mayor of Baltimore*, 7 Peters 247. *Lessee of Livingston v. Moore*, 7 Peters 551, 552.

[Bonaparte v. The Camden and Amboy Rail Road Company.]

of the inherent sovereignty of the states, which carries with it the obligation to make compensation. When this is done, no contract is impaired, as all persons hold their property subject to requisitions for public service, it is protected only against arbitrary seizure, not when it is taken or appropriated by public right for public use; compensation must indeed be made, but no particular mode is prescribed by which its amount shall be ascertained. It is a principle of Magna Charta, recognised in all the states, that no man shall be disseised or dispossessed of his property without due process of law, or legal process, or the judgment of a jury; 2 Co. Inst. 45; but if either mode is pursued, the principle is unimpaired. A law which authorizes the appropriation of property to public use, and prescribes a mode of proceeding by which compensation shall be ascertained and made, is not obnoxious to Magna Charta, or its construction in England or this state. An inquisition on a writ of ad quod damnum, is the usual mode, when a franchise is granted by prerogative, but when a corporation is created by act of parliament, it does not seem to be usual; it certainly is not necessary to give validity to the charter, or power to do the acts it authorizes. The writ of ad quod damnum appears not to have been in such common use in this state, before the adoption of the constitution, that it can be supposed to have been indispensable; on the contrary, the appointment of commissioners was usual from a very early period, Leaming & Spicer 440; Allison 274; it has been continued to the present time, and held by the late learned chancellor of the state to be constitutional. This usage, judicially sanctioned, must be taken as the practical exposition of the constitution and antecedent common law of the state, from which we do not feel at liberty to depart; it is also a common practice in England, Vid. 11 Ruff. 765; 2 Dow's P. C. 521, and in the other states, to appoint commissioners or other special tribunals to assess damages, by some mode or process specially prescribed, where a permanent appropriation of private property is made for a public use, on a road constructed by a state or a corporation. When a mere easement or right of passage is granted, it is usual to do it by a jury, 11 Ruff. 850; but it is competent to prescribe by law any other process for the same purpose.

We are therefore of opinion that the trial by jury is preserved inviolate in the sense of the constitution, when in all criminal cases, and in civil cases when a right is in controversy in a court of law, it is secured to each party. In cases of this description, the right to

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

take, and the right to compensation, are admitted ; the only question is the amount, which may be submitted to any impartial tribunal the legislature may designate. At the same time we fully concur in the decision of the supreme court of the state, that when a jury is necessary, the legislature cannot reduce the number required by the common law, which defines a jury to be a body of twelve men. It has not been contended that this provision of the constitution applies to proceedings in chancery or the orphans' courts of the state, nor does there seem any better reason for applying it to collateral process for assessing damages where no suit is pending ; it is a speedy and cheap mode of adjusting such matters, which are within the discretion of the legislature, unless prohibited by the constitution of the state. In *Bennett v. Boggs*, ante 60, we gave our opinion of the extent of the powers of the government of this state and their limitation, which need not be repeated now ; we adhere to the views there expressed, and refer to them for more detailed reasons in favour of the validity of the part of the law now under consideration.

A similar construction has been given by the supreme court of the United States to the seventh amendment to the constitution of the United States, which directs that "in all suits at common law, when the sum in controversy exceeds twenty dollars, the right of trial by jury shall be preserved." The occupying claimant law of Ohio directed commissioners to be appointed to value the improvements made upon land recovered by ejectment on an adversary title: it was held that the law was not repugnant to the constitution of the United States, and could be executed in the courts of the United States if it was not repugnant to the constitution of Ohio. *Bank of Hamilton, v. Dudley*, 2 Pet. 525, 526.

As the proceeding to ascertain damages under the law in question is neither a suit at common law, or the trial of a right in a court of common law jurisdiction, we are clearly of opinion that it is consistent with the constitutions of the state and of the United States.

2. It is next objected to the validity of this law, that it is to effect a private object, in making a road for the benefit of the corporation, and not for public use ; that consequently the legislature have no power to authorize the appropriation of any part of the complainant's property for such purpose without his consent. If the law is clearly open to this objection, it is a fatal one, as it is opposed to every constitutional principle which protects the rights of property, to take it from the lawful owner and appropriate it to the private use of an-

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

other, or a private corporation for its own use. Generally speaking, public corporations are towns, cities, counties, parishes, existing for public purposes; private corporations are for banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals, but their use may be public. 4 Wheat. 664. A road or canal constructed by the public or a corporation, is a public highway for the public benefit, if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll; its exaction does not make its use private. If the public can pass and repass, and enjoy its benefits by right, it matters not whether the toll is due to the public or a private corporation; the true criterion is, whether the objects, uses and purposes of the incorporation are for public convenience or private emolument, and whether the public can participate in them by right, or only by permission. To ascertain this, the provisions of the law must be examined.

The second section gives all the powers necessary to "perfect an expeditious and complete line of communication from Philadelphia to New York;" this is undoubtedly a great public and useful purpose, than which none can be more important, as a link in the great chain of national communication. The twenty-eighth section declares the road to be a public highway, and we should feel bound to so consider it, if other parts of the law did not give it a different character. The sixteenth section authorizes a toll which, estimating the length of the road at sixty miles, would amount to 6 dollars for each passenger, and 4 dollars 80 cents a ton for merchandise transported upon it, and the company is incorporated as a "transportation company." In this there are strong features of a monopoly for the sole benefit of the corporation; the toll cannot be called a reasonable one, and the public cannot use the road by right, when they may be subject to the payment of a toll, which is equivalent to a prohibition. These considerations have led our minds to strong doubts whether the declaration of the legislature is not in direct collision with the provisions of the law, but not so strong and clear as to justify us in declaring the law unconstitutional and void, on an application for an injunction.

3. The next ground taken by the complainant is, that the law gives the company no right to locate the road on his land; inasmuch as they were not authorized to construct any other but a lateral road to Bordentown, and the main route, as now located and about to be constructed, is at that place.

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

No particular line or route is designated in the law, the only definite points are the beginning and end of the road; there is enough in the law to infer the intent and meaning of the legislature to have been, that the main route should be at some distance from the Delaware at Bordentown, but it is not expressed so clearly as to prohibit its present location. We cannot say that the company had not a discretion in the selection of an intermediate route, when none was accurately defined, or that they have not acted in good faith, with sound discretion, and by their best judgment. They may have deviated from the understanding of the legislature, in locating the main branch where they were authorized to construct only a lateral one, but they must depart from the prescribed line before their proceedings can be arrested as unauthorized, and the deviation must be apparent, so as to indicate the want of discretion and judgment in the execution of the law, and an abuse and misapplication of their authority. The answers of the defendants, with the accompanying affidavits, are so full on the fact of the location being made discreetly and in good faith, that we cannot act on the contrary belief; nor on referring the survey of the road to the law, can we say that it is located on prohibited ground. If it is a purpresture or encroachment on the right of the public to the navigation or landing on the Delaware, it is indictable as a nuisance in the state court, where the defendant would have a right to trial by jury. But a chancellor would not consider him as already convicted of the offence, by awarding an injunction before a trial. *Columbian State Banking Company v. Weldon*, by Williamson, Cha., 18 Ves. 217, 219; 19 Ves. 617, 620; 2 Johns. Cha. 283; Harg. L. T. 85. An individual would be entitled to this remedy only in case the company should attempt to take possession of his land lying without the limits of the road as prescribed by the charter; but in this case, as none are defined, it must be left to the legislature to declare them by some future law, or by some legal proceeding in the state courts, to ascertain whether any right of the state has been violated by an usurpation under colour of law.

4. Assuming the validity of the law, the next objection to the proceedings of the company is, that they have not complied with its provisions, so as to have acquired any authority to enter upon and take private property for the purpose of constructing the road. This depends on the eleventh section, which authorizes the company to enter for two distinct purposes, 1st, to locate, 2d, to construct the road.

[Bonaparte v. The Camden and Amboy Rail Road Company.]

For the purposes of location they may enter at all times, and erect necessary works and buildings, with no other restriction or condition than that they shall do "no unnecessary injury to private property;" but whenever they have exercised this authority, by which they are enabled to make a location, the law directs that it shall be determined on, and a survey of the route to be deposited; and then provides, "that when the location is determined on, and the survey is deposited in the office of the secretary of state, it shall be lawful for the said company, by its officers, &c. to enter upon, take possession of, use, occupy, and excavate any such lands, &c. for the purposes of constructing the road." This language can admit of no construction, it limits the authority to the case provided for, imposes two conditions which must be performed before the power arises, and which can be performed by no other persons than the officers or agent of the corporation. The marked distinction between the right of entering *at all times* to survey and locate, and to enter to construct only on the performance of the conditions precedent, leaves no doubt that the intention of the legislature corresponded with their words.

Independently of the positive terms of the law, the nature of the conditions is such as to make the authority dependent on their performance. It would be most unreasonable as well as unjust, to permit private property to be taken for the construction of a road before its location had been determined on by the company. And nothing can be more reasonable and just, than that after a definitive location is so made, there should be some authentic evidence of its route in a public office, to which all persons can have access. Unless this is done, no person could know what part of his property was put in requisition, or have any check on the company against altering or deviating from the route determined on. It could not have been the intention of the legislature to confer a power so undefined and illimitable, and as it is not given by the words of the law, we cannot do it by construction. The defendants, in their answer, admit that the final location of the road is not yet determined on, and that the survey is not yet deposited; they cannot therefore have the authority of the law for entering on or taking possession of any part of complainant's property, for the purpose of constructing the road. The omission is exclusively their own, the law gave them ample powers to enter on the premises of individuals for every purpose of location, it pointed to the acts on which their power to construct depended; they have not thought proper to comply with the conditions imposed, the

[Bonaparte v. The Camden and Amboy Rail Road Company.]

consequence is obvious. The company will be trespassers if they disturb the possession of the complainant, and the court must proceed in the usual way, if he has made out his case.

Compensation is the next subject to be considered.

Taking it as an universal principle, that the right of every government to take private property for public use, and the obligation to make just compensation are unquestionable and concomitant ; taking it also as settled, that though the corporation created by this law is private, the objects and uses to be effected are public. The first question arising is, for what compensation must be made ; or, in other words, what is the taking of private property for public use, by a canal, rail road, turnpike, or other improvement or work, to be constructed for public convenience ? An entry on private property for the sole purpose of making the necessary explorations for location, is not taking it, the right remains in the owner as fully as before ; no permanent injury can be sustained, nothing is taken from him, nothing is given to the company. When nothing further is done, it is competent for the legislature to give this authority, without any obligation to compensate for a damage which must be trivial ; if the company commit any wanton acts, or do any unnecessary damage, they are trespassers, otherwise they have full power to locate the road, and the law is their justification ; 20 Johns. Rep. 104, 740 ; 7 Johns. Ch. 342, 344.

But when a claim is made for the permanent appropriation of private property for the use of the public, which requires the title of the owner to be vested in a corporation or state, the case is different. The proprietor is disseised, his right is extinguished, and his property is taken from him and given to another by the law ; this creates the obligation to make compensation. There is also another obligation in this case upon the state, in the law authorizing the complainant to purchase and hold real estate. Both would be violated if compensation is not made, and the law would be void for impairing the obligation of a contract ; or if not void, inoperative to pass the right of property, till a just compensation was made. It is not intended to lay down the broad proposition, that it is indispensable that the law should contain a provision for compensation, or prescribe the mode of making it. Though the law may be silent on this subject, yet if compensation is actually made in any way, or if the legislature should, by a subsequent law, direct it to be done, the law would be valid. But before this is done, the execution of any authority which the law might profess to give, to take possession of private property, would be enjoined ; for the right of the owner

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

to receive, and the duty of the legislature to provide for compensation is absolute, and the rights of property cannot be taken without an equivalent. By suspending the execution of the law by injunction, no permanent injury could be done to the proprietors, and no just complaint could be made by the legislature or the corporation, by withholding the enjoyment of the property for the objects of the law, till they had performed their duty. 20 Johns. Rep. 745.

We are aware that the supreme court of New York have declared such a law to be void, as violating a great fundamental principle of government, *Bradshaw v. Rogers*, 20 Johns. Rep. 105, 106; a different opinion is intimated by chancellor Kent, in delivering the opinion of the court of errors in the same case, 20 Johns. Rep. 745. We should have felt much difficulty in forming an opinion on a point where there was such high judicial authority on both sides, had we not been aided by two analogous decisions of the supreme court of the United States. In *Terrett v. Taylor*, a perpetual injunction was decreed against parties claiming land under a law of Virginia, which did not constitutionally divest the title of the complainant. 9 Cranch 43, 55. In the *Bank of Hamilton v. Dudley*, they declared, that they would enjoin the execution of a judgment in ejectment, till the decree of the circuit court, on the report of commissioners appointed under the occupying claimant law of Ohio, for compensation to the defendant for his improvements, should be carried into effect. 2 Peters 526. On this authority, we should have no hesitation in enjoining the execution of the law, if it provided no compensation, without declaring it void; this would do justice to the individual and without defeating the objects of the law.

But in adopting this course, we should feel it our duty to go further than to enjoin, till the owner should have an opportunity of seeking and obtaining compensation according to the view of chancellor Kent, in 20 Johns. Rep. 745; we would continue the injunction, till the company had made the compensation, without imposing on the owner any burthen of seeking or pursuing any remedy, or leaving him exposed to any risk or expense in obtaining it. The duty of the legislature is to provide for compensation, and of the company to make it, simultaneously with the disseisin of the owner, and the appropriation of his property to the purposes of the law.

As compensation is a necessary qualification to the exercise of any corporate authority over the property of individuals, it must be made previously to the divestiture of their right, and its final appropriation

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

to the public use, 2 Johns. Ch. Rep. 166 ; we do not say that the sum due must in all cases be actually paid, before the company may proceed to execute the law by commencing the construction of the road. Though the fifth amendment of the constitution may not apply to cases arising under the legislative powers of the state, 20 Johns. Rep. 106, it may be taken as a correct definition of the rule of public law; there must be "just compensation" made to the owner. The public is considered as an individual treating with another for the exchange of property, or rather compelling the owner to alienate his property for a reasonable price. Vide 2 Coke's Inst. 45; 1 Bl. Comm. 139 ; 2 Johns. Ch. Rep. 167. When the law makes provision for compensation, prescribes a mode of assessment, an obligation for its payment in a reasonable time, undoubted security and efficient means for its prompt collection, and the company comply with all the requisitions of the law, so that compensation is certain. We are not prepared to say, that it was not a substantial fulfilment of the duties of the legislature and corporation, so far as to authorize them to *commence* their works, before the actual payment of the money. This case does not require us to define precisely, the extent to which the legislature may go in giving time for payment; some discretion may be used, depending on the circumstances of the case, of which a court of equity would judge, so as to secure to the owner a just indemnity, without unreasonable delay, or unnecessarily impeding the prosecution of great works of public improvement.

In the present case, the law directs compensation to be made, and prescribes the mode of ascertaining it, when the right of the company attaches, and their obligation to compensate is incurred. At present it is not necessary to inquire further, than what are the requisitions of the law before the company have a right of possession, and whether they have on their part taken the steps incumbent on them to bring their power into action.

By the eleventh section of the law, it is made a condition precedent to the entry for construction of the road, that its location be determined on, and a survey thereof be deposited in the office of the secretary of state. When that is done, the company may proceed to enter on the route, and carry the objects of the incorporation into full effect, by taking materials for the construction of the road and its appendant works; "*subject to such compensation therefor as is hereinafter provided.*"

The thirteenth section provides, that when no agreement can be

[Bonaparte v. The Camden and Amboy Rail Road Company.]

made with the owner, a particular description of the land and materials required, shall be made out on oath, with the name of the owner and his residence, and given to a judge of the supreme court; who shall, after giving twenty days notice, appoint commissioners to appraise the land and materials, and to assess damages thereon; who shall make their report in ten days, and deposit it in the office of the clerk of the county. Such report, shall be plenary evidence of the right of the company to the land and materials, and of the owner to recover the amount awarded to him, which shall be a lien in the nature of a mortgage on all the property of the company.

The fourteenth section gives to either party the right of making an application to the supreme court, to set the report aside, "provided, that such application shall not prevent the company from taking the land and materials on the filing the aforesaid report."

As the eleventh section makes the right of the company subject to the compensation provided by the thirteenth, a compliance with the directions of the latter is clearly a condition precedent. Were the words of the law less explicit, the nature of the right asserted by the company, would make it our duty to hold them to a strict compliance with all the injunctions of the law, under which they claim to exercise a special, and a high authority. In the first place, to take possession of complainant's property, in the next to make an absolute and permanent appropriation of it to their use, and in the third to divest all his right and transfer it to them by the operation of this law. The conditions on which the lawful exercise of this authority depends are plainly defined, they are to be performed by the company as the foundation of their right of entry. The law has not first given this right, and made compensation a condition subsequent; it has not left the owner to seek his remedy for property already appropriated and seized, but prescribed the terms on which alone it can be done, by making it the duty of the company so to proceed, that the same act which gives them a right to another's property, shall operate as a mortgage on all theirs, for the just compensation to which he is entitled. No provision is made for an application by the owner, the law makes him passive for the best of reasons; while his rights of property remain unimpaired, he has nothing to ask or complain of. It is not for him to apply for a right in the company to dispossess him, and for compensation as the consequence; the company who want his property, must take legal process, or the due course of law to obtain it, their authority is special,

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

limited, and conditional, and must be strictly followed. The law is made for their benefit, and it is their duty to take the previous steps incumbent on them, or they become trespassers. The principle is this, the company should not be interfered with, if they act within their authority, but that for the very reason that such large powers were given, the court will keep them within the limits of those powers; 2 Dow's.P. C. 523; they must pursue the precise remedy given them by the law and are entitled to no other. 3 Mass. 307, 310.

As it is admitted that these steps have not been taken, which are made indispensable to the right of the company to enter upon, or take possession of complainant's property; they have no right or power under the law to exercise any part of the authority given by the law, to take land or materials for the construction of the road. By their own neglect the law has been taken from under them, and they now stand before the court, as if their charter contained no provision for compensation, and can stand in no better, till they strictly comply with all the provisions of the thirteenth section. It would contradict the law and every principle of justice, to permit the complainant to be disseised, not only without due process of law, but in violation of that which has been prescribed for the benefit of the corporation, and to be turned over to seek his compensation as he may.

The only remaining question, is whether the complainant has made out a case for an injunction.

He is the acknowledged owner of the land on which it is intended to construct the road; he has the perfect right to use, occupy and enjoy it as he has been accustomed to do according to his own pleasure; he may devote it to whatever purposes he pleases, in which the law protects him equally with any other proprietor. His trees, waters, roads, parks, walks and pleasure grounds are his, by the same right as his mansion house, his grain fields or his meadows. 2 Johns. Cha. 378; 6 Johns. Cha. 439; 1 Ves. Sr. 183; 2 Brown's Cha. 88; 15 Ves. 13; 7 Johns. Cha. 732, 734; 16 Ves. 341; 5 Ves. 688; Dick. 431.

By not having complied with the provisions of the eleventh and thirteenth sections of their charter, the corporation, or any person acting by their authority, will be trespassers if they enter upon the complainant's premises without his consent, for any other purpose than locating the road; thus far his case is made out, and his right clear.

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

The injury complained of as impending over his property is, its permanent occupation and appropriation to a continuing public use, which requires the divestiture of his whole right, its transfer to the company in full property, and his inheritance to be destroyed as effectively as if he had never been its proprietor. No damages can restore him to his former condition, its value to him is not money which money can replace, nor can there be any specific compensation or equivalent; his damages are not pecuniary, *vide* 7 Johns. Ch. 731, his objects in making his establishment were not profit, but repose, seclusion, and a resting place for himself and family. If these objects are about to be defeated, if his rights of property are about to be destroyed, without the authority of law; or if lawless danger impends over them by persons acting under colour of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission; 7 Ves. 307; 2 Atk. 185; 1 Ves. Sr. 476; Dick. 149, 164; 6 Johns. Cha. 51, 160; 7 Johns. Cha. 331; 3 Atk. 21; 2 Ves. Sr. 453; 6 Ves. 147; 6 Johns. Cha. 497; 15 Ves. 138; 16 Ves. 341; 17 Ves. 109, 128, 281; 18 Ves. 184; so of any act of peculiar trespass, irreparable, great, grievous mischief or lasting injury, destructive of property, a right or franchise; 2 Johns. Cha. 474, 162; 9 Wheat. 840, &c.; taking land for a canal without authority, surveying and dividing a farm, 2 Dow's P. C. 520, or the permanent appropriation of land, 7 Johns. Ch. 336; which is a total destruction of the owner's right; 6 Johns. Cha. 501; these are proper cases for injunction.

But the danger must be imminent, not imaginary. On this point the answer admits, that the road has been laid off and staked out on complainant's land, in order to construct it; that this route is the only practicable and feasible one, unless at a greatly increased expense and distance; that the excavations have been begun at each end, and some intermediate points of the route; but it denies that they intend to proceed to the construction of the road, without the consent of the proprietors, the filing the survey and making compensation, which the company are ready and willing to make. There is, however, no denial of the allegation in the bill, that the company have collected labourers, vehicles, implements, &c. at Bordentown, with the intention of commencing operations on complainant's land, on the contrary, it is in substance admitted by the answer, which

[Bonaparte v. The Camden and Amboy Rail Road Company.

averts that it is essentially necessary, to effect the great public objects of the road, to take the land on which it is located. As the complainant's allegation in this respect was supported by his affidavit, the answer ought to have denied it explicitly; this has not been done, and the court must take this part of the bill to be true. Nor does the answer aver that the company have taken, or intend to take any of the steps prescribed in the thirteenth section, previously to commencing their operations on the road; the general averment of their willingness to make compensation cannot avail them, it is no remedy to the complainant, or a compliance with the terms of the charter. From the whole tenor and purport of the answer, it is apparent that the company stand upon their right to effect the great and public objects of their incorporation, without any previous obligation to make compensation; under such circumstances we think the danger of a lasting permanent injury to the complainant, so imminent as to bring his case within the well established rules of courts of equity in granting injunctions.

To entitle a party to this remedy, it is not necessary that there be any threat or declared intention to commit the act which will cause the injury; it is enough that preparatory acts are done, from which the inference is made of the defendant's intention, as if he employs a surveyor who marks trees, it is presumed to be done with the intention of cutting them down; Eden on Inj. 234; 7 Ves. 309; 5 Ves. 638; 8 Ves. 596; though the defendant denies it in his answer; Dick. 101; so if he insists on his right to do the act, 2 Atk. 184; Dick. 670, or makes claim to land not his own, but the complainant's; 9 Cranch 43; mere apprehension, fear or belief is not enough, unless such facts appear as show them to be well founded, so as to satisfy the court that "*the axe is laid at the foot of the tree,*" and that the act will be done without their interference; whenever that is done the injunction goes. 11 Ves. 53, 54; 2 Atk. 182, 183; 9 Wheat. 840. In this case there seems a moral certainty, that without this preventive process the complainant will be expelled from part of his property without lawful authority; an injunction will not injure any right vested in the defendants, or have any effect, if it is not intended to proceed to the construction of the road till all the conditions of the law are performed.

That the complainant may recover damages at law, is no answer to the application for an injunction against the permanent appropriation of his property for the road, under a claim of right; this is

[*Bonaparte v. The Camden and Amboy Rail Road Company.*]

deemed an irreparable injury, for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for its interference. Trespass is destruction, in the eye of equity, when there is no privity of estate, it prevents its repetition or continuance, protects the right, arrests the injury, and prevents the wrong; this is a more beneficial and complete remedy than the law can give, and therefore the proper one for a court of equity to administer. 9 Wheat. 842, 845; 1 Ves. 189; 2 Johns. Ch. 473; 4 Pet. 215.

We therefore feel bound to enjoin any further proceedings, after the road is finally located and the survey deposited, until the filing the report of commissioners, pursuant to the thirteenth section of the charter.

Circuit Court of the United States.**PENNSYLVANIA, OCTOBER TERM 1830.****BEFORE**

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

UNITED STATES V. BENNER.

A certificate by the secretary of state, under seal of office, that a person has been recognised by the department of state as a foreign minister, is full evidence that he has been authorized and received as such by the president of the United States. Any person who executes process on a foreign minister is to be deemed an officer under the twenty-sixth section of the act of 1790. To support an indictment under this law it is not necessary that the defendant should know the person arrested to be a foreign minister.

A foreign minister cannot waive his privileges or immunities, his submission or consent to an arrest is no justification.

An assault committed by him may be repelled in self-defence, but does not justify an arrest on process.

An indictment under the twenty-seventh section of the act of 1790 need not state the offence to be committed by an officer. It is sufficient to state that the person on whom it was committed was a public minister, without stating that he had been authorized and received as such by the president. This section applies to all public ministers.

An attaché to a foreign legation is a public minister within the act of congress.

THE defendant was indicted under the twenty-fifth, twenty-sixth and twenty-seventh sections of the act of 1790, 1 Story 88, 89, for arresting and imprisoning Lewis Brandis, a minister of the king of

[United States v. Benner.]

Denmark. The indictment contained four counts. 1. Stating Mr Brandis to be a public minister, to wit, a secretary of legation. 2. A public minister, to wit, an attaché to the legation of the king of Denmark. 3. A minister received as such by the president of the United States. 4. An attaché received as such, &c.

Mr Dallas, district attorney, gave in evidence a warrant of arrest, issued by an alderman of this city against Mr Brandis, for a small debt, on which the defendant, acting as a constable, arrested Mr Brandis, detained, and took him before the alderman.

Mr Dallas then offered in evidence the following certificate from the secretary of state, under the seal of the department, to show the public character of Mr Brandis.

“ I certify, that by letter dated the 8th November 1828, the Danish minister informed this department that Mr Louis Brandis had arrived in this country in the character of attaché to the legation of Denmark in the United States; and that the said Louis Brandis has accordingly, since that date, been recognised by this department as attached to the said legation in that character.”

Mr C. J. Ingersoll, for the defendant, objected to its admission because it did not state that Mr Brandis had been received, or authorized by the president of the United States, as a public minister. It only states that he has been recognised as attached to the legation of Denmark, which is neither authorization or reception, and it does not state the recognition to be by the president, which is necessary to bring the case within the law.

Mr Dallas referred to the law organizing the department of state. 1 Story 5. A recognition by the department of state, the officers of which acting under the orders of the president, their acts are his; such recognition is an authorization and reception by the president. Independently of this, the certificate is evidence of the fact of Mr Brandis being a public minister, within the twenty-seventh section, which does not require him to be authorized or received in order to protect him from violence or imprisonment; it is therefore clearly admissible on the counts founded on that section.

BY THE COURT. The evidence is admissible to show the fact of Mr Brandis being a public minister, it is a question of law what is

[United States v. Benner.]

its legal effect, as to bringing him within the twenty-fifth and twenty-sixth sections of the law, on which the court will give an opinion to the jury, but as it is clearly competent under the twenty-seventh, it must go to the jury.

Mr Dallas, in summing up to the jury, took the position, that every person charged by his sovereign with the administration of his affairs in a foreign country, is viewed by the law of nations as a public minister; be his grade what it may, he becomes a minister by being sent abroad, by authority, on a diplomatic function. Vattel, b. 4, ch. 5, sect. 56, p. 132; Dip. Man. 99. Every person so sent to this country, and recognised as such by the department of state, is deemed a minister, authorized and received by the president, both by the acts of congress, and the decisions of this and the supreme court. 2 Wash. C. C. 205, 435; 4 Wash. 535; United States v. Ortega, 11 Wheat. 467.

As a person attached to the Danish legation, or an attaché, Mr Brandis was invested with a diplomatic character, as a public minister of some grade, which invested him with all the immunities of one. The only question for the jury is, whether he has been arrested, imprisoned, or violence offered to his person.

Mr C. J. Ingersoll, for the defendant.

The twenty-fifth section applies only to ministers who have been authorized and received by the president; it is this act alone which has the effect of conferring on them the privileges of ministers, as the registration of domestics has under the twenty-sixth. To bring the case within these sections, the authorization and reception must be by the president himself, a recognition by the department of state is not his act. The third section of the second article of the constitution, gives the power of receiving ambassadors and other public ministers to him alone, which is a constitutional power, that cannot be exercised by the secretary of state, under the act of 1789; 1 Story 5; it must be done by the sovereign. Martin 218; 2 Burlam. Pol. Inst. 198, sect. 3.

The twenty-seventh section applies only to such ministers, as are not in the exercise of their functions, in virtue of their having been received or authorized as such, but are here in transitu, or returning. If, however, Mr Brandis can be considered as having the privileges of a minister, he waived them by submitting to the arrest, and no

[United States v. Benner.]

man can be deemed in law to be imprisoned, when it is done with his consent; 1 Bl. Comm. 136; if he waived his privilege, the arrest was lawful by our laws, as that is a matter between him and his sovereign. So if a minister assaults another, he may be killed in self defence, though not by way of punishment. Grotius, b. 2, ch. 17. True, it is proved that Mr Brandis struck the defendant, by which he lost his privilege; this may be done by his own acts, in not asserting it when arrested, in the same manner as if a man sued in a state court, does not claim his right to be sued only in a federal court. 1 Peters's C. C. 490. A minister also loses his privilege, if he is superseded by another who acts in the place, by the orders of the sovereign; 9 East 447; to entitle him to exemption from process, it must be proved that his privilege continued till the arrest. The certificate in this case states only, that he had been recognised, not that he was a minister at the date of it.

Mr Dallas, in reply.

The certificate is full evidence of a recognition by the president, up to the time when it is given, recognition *ex vi termini*, imports his authorizing and receiving him as minister, his appointment and authority from his sovereign makes him such, the recognition of which by the president, is an admission of the fact, and a receiving him as such without any prescribed form or ceremonial. It is the act of the executive, in whom the nation has incarnated their power to receive ambassadors and other ministers, as a supreme unlimited power, expressly conferred by the constitution, not controllable by any other branch of the government.

Being a minister, certain privileges and immunities attach to his character, not as an individual, but as the representative of his sovereign; he is considered as not resident in the country to which he is sent, but near to it, and is not amenable to the laws, or jurisdiction of its courts. The immunity of his sovereign is imparted to him, his person, his house, is on the territory of his sovereign, and so are all his privileges those of his sovereign. He may waive or renounce his personal rights, but not those he enjoys in his representative character. 4 Wash. 535; 3 Burrow 1480; Talb. 281. If his sovereign divests him of it, as in the case in 9 East 447, he may be arrested. The cases where a person may waive his privilege, are where the court has jurisdiction of the person and cause of action, but a party has a personal privilege which he does not assert, as in

[United States v. Benner.]

1 Peters 490. Here there is a want of jurisdiction. Admitting that by giving a blow to the defendant, he subjected himself to the law of self defence, according to Grotius, it is not to punish, it cannot make him subject to an arrest on process for a debt. Having proved that Mr Brandis was a public minister, and that defendant arrested him, it is not necessary to prove that he knew his character, this is not required by the law, 2 Wash. 210; 4 Wash. 537; 2 Mas. 150; the defendant acts at his peril.

The charge to the jury was delivered by BALDWIN, J.

By the constitution of the United States, the power of receiving ambassadors and other public ministers, is vested in the president of the United States; this power is plenary and supreme, with which no other department of the government can interfere, and when exercised by the president, carries with it all the sanction which the constitution can give to an act done by its authority.

In the reception of ambassadors and ministers, the president is the government, he judges of the mode of reception, and by the act of reception, the person so received, becomes at once clothed with all the immunities which the law of nations and the United States, attach to the diplomatic character.

The evidence of the reception of Mr Brandis in this character, is the certificate from the secretary of the state which has been read. By the law organizing the department of state, it is the special duty of this officer, to perform all such duties as shall be entrusted to him by the president, to conduct the business of the department in such manner as he shall order and instruct, also to take an oath for the faithful performance of his duties. He is denominated in the law, "the secretary of foreign affairs;" his appropriate duties are, correspondence and communication with foreign ministers under the orders of the president; he has the custody of all the papers and archives of the department in relation to the concerns of the United States with foreign nations. Whatever act then is done by that department must be taken to be done by the orders or instructions of the president; the certificate of the secretary under the seal, oath, and responsibility of office, must also be taken as full evidence of the act certified. The president acts in that department through the secretary, the one directs, the other performs the duties assigned; the law makes that department with all its officers, the agent of the executive branch of the government, so that a certificate under its

[United States v. Benner.]

seal by the secretary is full evidence, that what has been done by the department has been done by it in that capacity. If the law imposed on that department any duties upon subjects over which the president had no control, or none exclusive of the other branches of the government, a certificate from its chief officer would not be evidence that it was done by the president; but as it can act on no subject unless under his orders, its acts must be taken to be his, especially as to the reception of ministers, as to which congress have no power to enjoin any duties on the department, or its officers.

You will therefore consider Mr Brandis as having been recognised by the president in the character of an attaché to the legation of Denmark in the United States; and that such recognition is, *per se*, an authorization and reception of him, within the meaning of the act of congress, for we cannot presume, that the president would recognise a minister, without receiving him. In the case of the United States v. Liddell, it was held by this court, that a certificate from the secretary of state, that a chargé d'affaires of Spain, had introduced a person to the president as an attaché and secretary to that legation, was evidence of his reception as such. 2 Wash. 205, 206; 4 Wash. 531, 536, S. P.

Such recognition invests him with the immunities of a minister, in whatever form it may be done, and no court or jury can require any other evidence of a reception: we instruct you then as a matter of law, that at the time of the alleged arrest, Mr Brandis was a minister of Denmark in the character stated in the certificate.

The only remaining question is, whether he was arrested, imprisoned, or violence offered to his person by the defendant. An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest. Imprisonment is the detention of another against his will, depriving him of the power of locomotion: if you believe the witnesses, the evidence fully establishes these charges in the indictment.

Whether Mr Brandis submitted or consented to the arrest is not material. The privileges of a foreign minister are not personal, nor is their violation punished as an injury to himself, the immunity from arrest is the privilege of the sovereign who sends him, the injury is done to him, in the person of his representative. The laws of nations protect the minister, that he may not be obstructed in the

[United States v. Benner.]

business of his mission, his person is as inviolable as his sovereign, within whose territory he is presumed to reside.

Hence the laws of the country to which he is sent, can no more be enforced against him, than in the country from whence he came; being considered as in the territory of his own sovereign, no other has any jurisdiction over him. The consent of the sovereign to the violation of the rights and privileges which belong to himself, either in person or in his representative, are equally necessary, whether the minister resides in a foreign country or his own. The general law of all nations, as well as the municipal laws of each, exempt ministers from all jurisdiction or control over their persons, so long as their representative character is recognised by the government which sends or receives them; if they exercise the functions of ministers, or retain that character, their exemptions attach to their office whether they claim them or not. There is no principle of national law, or any word in the act of congress, which justifies the arrest of a minister who waives the privileges of the diplomatic character, you will therefore dismiss all considerations of this kind from your minds. But though the person of a minister is inviolable, yet he is not exempted from the law of self defence; if he unlawfully assaults another, the attack may be repelled by as much force as will prevent its continuance or repetition. The counsel for the defendant has endeavoured to bring his case within this principle, by evidence that he received a blow from Mr Brandis; were the fact so, however, it would be no justification of the arrest on process, which is not a right of self defence.

It is objected to this prosecution, that the defendant was not an officer within the meaning of the law; but this objection cannot avail him, the warrant was directed "to the constable of ——— ward," the defendant assumed and acted in that character in the execution of the warrant, and must be considered as one *de facto* estopped by his acts from denying it.

It is next contended that it must be proved that the defendant knew Mr Brandis to be a minister at the time of the arrest; the law does not make knowledge an ingredient in the offence, the case meets fully the definition of the offence prohibited by the act of congress, which, as a general rule, is all that is requisite to find a verdict of guilty; this objection has been overruled by this court in other cases, 2 Wash. 210; 4 Wash. 537, and, we think, very properly.

[United States v. Benner.]

The jury found the defendant guilty on the second count, charging, "that the said Peter R. Benner, afterwards, to wit, &c. with force and arms, did imprison the said Lewis R. Brandis, he, the said Lewis R. Brandis, then and there being a public minister, to wit, an attaché to the legation of his majesty the king of Denmark, near the United States of America, in manifest infraction of the law of nations, contrary," &c.

Mr Ingersoll then moved for a new trial, which was overruled.

He then moved in arrest of judgment.

1. Because this count does not allege the defendant to have been an officer, or to have executed process against a minister.

2. Because it does not allege that Mr Brandis had been authorized or received as a minister by the president.

Mr Ingersoll.

Every indictment must contain a description of the offence with certainty; 1 Chitty's C. L. 169 to 172, 227, 228, 275, 281, 287; the want of certainty is not cured by verdict, and any defect which can be reached by demurrer is good cause for arresting the judgment. 1 Chitty 61.

There can be no conviction under the twenty-fifth and twenty-sixth section, unless the imprisonment is under process and executed by an officer who acts under colour of its authority; here no process is averred to have issued, and the defendant is not stated to be an officer.

Under the twenty-seventh section, the imprisonment need not be by colour of or under process, but the minister must have been authorized and received by the president; the three sections are connected, the twenty-seventh refers to a minister who has been received, as the definition of one who was intended to be protected by the law. The fact of reception must therefore be averred distinctly, the want of which can be supplied by no intendment, that being the only act which accredits the minister, it must be found to have been done by the president, or the law cannot apply.

An attaché is not a public minister; attaché is not an English word, and all indictments must be in English; 1 Saund. 242, n. 1; finding him a minister, viz. an attaché, does not show him to be one; the office of a videlicet is only to particularize, explain or restrain; but like an innuendo, it cannot enlarge the meaning. 1 Chitty 226.

[United States v. Benner.]

Mr Dallas.

The second count is under the twenty-seventh section, and laid in the words of the law, which do not require that the indictment should superadd any thing to the description of the offence, or to aver any thing which is not made a constituent of the offence. 2 Mason 445. This law is passed to vindicate the law of nations, which protects ministers not received; Vattel, b. 4, ch. 7, sect. 84, p. 466; as where they are in transitu, or on their arrival before being received, recalled or dismissed; this section is intended to embrace ministers of every description, whatever may be their situation, if they are so at the time of the offence.

It is sufficient for an indictment, that it lays the offence in substance according to the requisitions of the law creating it: exceptions must be made out by the defendant; Hawk. b. 2, ch. 25; Salk. 110; 1 W. Bl. 230; 2 Gall. 15; 2 Hale 107; if it follows the words of the statute, no further particularity is required. 2 Burr. 1035; 12 Wheat. 460, 461; 2 Mass. 141.

A videlicet is to explain, if material, it must be proved, if not, it is surplusage and not traversable; 2 Saund. 291, n. 1; though it must appear that Mr Brandis is a public minister, the grade is immaterial; the word attaché is used here as a description, a designation of his particular relation to his sovereign; it is a term well known, as *chargé des affaires*, which in the case of Ortega was held good. 4 Wash. 535; 11 Wheat. 467. It is not usual or necessary to translate in an indictment a term of designation used by a foreign government in its application to one of their agents near foreign governments. 1 Chitty 175; 1 Saund. 242.

The opinion of the Court was delivered by Mr Justice HOPKINSON.

The defendant was put upon his trial upon an indictment containing six counts. The *first* charged, that he did imprison one Louis Brandis, he being public minister, to wit, the secretary of the legation from his majesty the king of Denmark, near the United States of America. The *second*, that he did imprison the said Louis Brandis, he being a public minister, to wit, an attaché to the legation of his majesty the king of Denmark, near the United States. The *third* sets forth, that a certain writ was sued forth and prosecuted by one George Wilson, from one John Binns, an alderman of the city of Philadelphia, whereby the person of the said Louis Brandis, a public minister, the secretary of the legation of his majesty the king

[United States v. Benner.]

of Denmark, authorized and received as such by the president of the United States, was arrested; and that the defendant, Peter R. Benner, being an officer, to wit, a constable of the city of Philadelphia, did execute the said writ, and thereby arrest the person of the said Louis Brandis. The *fourth* is the same with the third, except that Louis Brandis is styled an attaché of the legation of his majesty the king of Denmark. The *fifth* charges, that the defendant did offer violence to the person of the said Louis Brandis, a public minister, to wit, the secretary of the legation of his majesty the king of Denmark. And the *sixth* is the same with the fifth, except that Louis Brandis is styled an attaché to the legation.

After a full hearing upon all the facts and law of the case, it was given to the jury under a charge from the court, in which the evidence was reviewed, and the questions of law distinctly answered. The jury returned with a verdict of conviction on the second count of the indictment, and of acquittal as to all the others.

The counsel of the defendant has filed certain reasons in arrest of the judgment on this conviction; and other reasons for a new trial. Both motions have been elaborately argued, and are now to be decided.

The reasons in arrest of judgment are two:

1. That the only count on which the verdict is given against the accused, does not describe him as an officer; does not charge him with having executed process, nor state any offence against any act of congress or law of the United States.

2. That the said count does not state that a public minister of any foreign power or state, authorized and received as such by the president of the United States, was imprisoned, or was or might have been arrested or imprisoned.

The act of congress upon which this indictment is framed provides, in its different sections, for different classes of cases, and the counts of the indictment are made to meet the different provisions of these sections. The twenty-fifth section enacts, that if any writ or process shall be sued forth or prosecuted in any of the courts of the United States, or of a particular state, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the president of the United States, may be arrested or imprisoned, &c., such writ or process shall be adjudged to be utterly null and void.

The twenty-sixth section enacts that in case any person or persons

[United States v. Benner.]

shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, &c.

The twenty-seventh section enacts, that if any person shall violate any safe conduct, or passport duly obtained, and issued under the authority of the United States, or shall strike, wound, imprison, &c., by offering violence to the person of an ambassador or other public minister, such person, &c.

The twenty-fifth and twenty-sixth sections afford protection and redress for public ministers, authorized and received as such by the president of the United States, and against arrest and imprisonment under and by virtue of any writ or process sued forth and prosecuted in any court of the United States, or of a particular state, or by any judge or justice therein, and all the counts in this indictment intended to charge an offence in violation of these sections, do state that Louis Brandis was a public minister, authorized and received as such by the president of the United States; that a writ was sued forth against him from an alderman of the city of Philadelphia, and that the defendant, being an officer, did execute the said writ, and thereby arrest the person of the said Louis Brandis; upon these counts the defendant is acquitted by the verdict of the jury.

The twenty-seventh section of the act is intended to cover other cases not described in the preceding sections, and makes it penal for any person to imprison the person of a public minister, although he may not be authorized and received as such by the president of the United States, and although the person who thus offers violence to his person, be not an officer, and does it not by virtue of any writ or process from any court, judge or justice. The count on which the defendant has been convicted, charges the offence punishable under this section of the act, and the offence is described in the indictment as it is described in the act; which does not require that the defendant should be an officer having executed process, nor that the public minister, who was imprisoned, should have been authorized and received as such by the president of the United States.

The reasons for a new trial will now be considered.

The second count on which the defendant has been convicted, relates to the same transaction, and the same public minister as the first, of which he is acquitted, and differs from it only in describing the minister as an attaché to the legation of Denmark, and the first

[United States v. Benner.]

calls him the secretary of the legation ; but it was the clear right of the jury, and so it was given them in charge, to find a general verdict of guilty, leaving it to the court to apply it to the counts in the indictment, or to select for themselves the count on which they would render the verdict, as in their opinion the evidence might warrant. If the count were bad in itself, such a verdict could not be maintained ; but it is no objection to it, that it is substantially the same with another count on which the defendant has been acquitted, for the different counts of an indictment always relate to the same transaction, describing it in different ways, or with different circumstances, that the jury may apply their verdict to all or either of them, as the evidence shall warrant ; or if the verdict be generally guilty, the application of it is made by the court. No injury or injustice is done to the defendant, who is put but once on his trial for the same offence. The jury, in this case, have not selected the count for their verdict of conviction to which the evidence most particularly applies ; but this was for them to judge of, and is no cause of complaint on the part of the defendant ; it cannot affect his punishment, and is clearly maintained by the evidence.

It is our opinion that the reasons filed in arrest of judgment are not maintained, and it is ordered that the motion be overruled.

THOMPSON V. PHILLIPS.

Where a levy and inquisition were set aside by the court, but the fieri facias not set aside, a new inquisition was held and returned with the fieri facias and levy annexed, condemning the property ; a venditioni exponas was issued, the property sold and deed acknowledged by the marshal in open court : *Held*, that the validity of the sale was not affected by the want of an alias fieri facias, or a new levy.

The acknowledgement of a sheriff's or marshal's deed is a judicial act, which cures all defects in process or its execution, which the court have power to remedy by their order.

If the court has jurisdiction of the case, the parties, and power to order the sale by a venditioni exponas, a sale so made, and a deed acknowledged, cannot be set aside in a collateral action.

An objection to such sale must show the want of power in the court.

Irregularities must be corrected by the court which issues the process.

Erroneous proceedings must be reversed on a writ of error, or they are binding.

The state law of 1798, limiting the lien of judgments, is a law of property and title applicable to judgments in this court, of record before its passage.

This act does not admit of the same construction as the statute of Westminster, giving a scire facias after a year and a day, there being no analogy between them as to the mischief or remedy.

A capias ad satisfaciendum taken out and returned non est inventus, does not preserve the lien of a judgment without a scire facias within five years from its entry.

As a general principle, an elder judgment is entitled to prior satisfaction ; a sale under a younger judgment does not affect the prior one, or prevent a sale under it so as to pass the title ; and if the question was open, this court would give such construction to the fourth section of the state law of 1705.

But the rule established by the supreme court of this state is otherwise, and will be adopted as the construction of a state law : Therefore, held :

That a sale by a sheriff, under a judgment in the court of common pleas in this state, passes a title to the purchaser discharged from a prior judgment in this court, either against the defendant, as whose property it was sold, or against any persons from whom it was conveyed to the defendant.

The settled construction of a state law, by the highest court of the state, is considered by the federal courts as their rule of decision under the thirty-fourth section of the judiciary act, such construction being taken as a part of the law.

THIS was an action of ejectment for a house and lot in Philadelphia. Both parties claimed under Charles Hurst, who was seised in fee of the premises in May 1775, subject to a ground rent. The plaintiff claimed title by a deed from Charles Hurst to Edward Evans, dated 18th of May 1775, and a deed of the 21st of August 1787, from Evans to Charles Hurst. On the 11th of April 1791, a judgment was obtained in this court, by Thomas and John Wilson

[Thompson v. Phillips.]

against Charles Hurst, under which the premises in question were sold by the marshal, and by a deed acknowledged in court on the 11th of April 1825, conveyed by him to Elizabeth Hess, who, on the 26th of March 1826, conveyed the same to the lessor of the plaintiff.

The defendant claimed title by a deed from Charles Hurst to John Lang, dated 1st of February 1795, and a regular chain of intermediate deeds to Alexander Hemphill, against whom a judgment was entered in the court of common pleas of Philadelphia county, on the 23d of May 1814, under which the premises were sold by the sheriff; and by deed acknowledged in court on the 22d of May 1815, conveyed by him to John B. Newman, under whom the defendant is in possession. John Lang, and those claiming under him, have been in possession of the premises from the date of the deed from Charles Hurst, in 1795, and made valuable improvements thereon. On the judgment of *Wilson v. Hurst*, in 1791, several writs of execution and venditioni exponas had issued, on which sales had been made by the marshal, deeds acknowledged and given to the respective purchasers; but no levy was made on the premises in question before April 1823, though they were bound by the judgment at the time of the conveyance by Hurst to Lang.

Four questions were raised on the trial:

1. On the validity of the marshal's sale and deed to Elizabeth Hess, which was alleged by the defendant to be void for want of a levy.

2. Whether the lien of the judgment of *Wilson v. Hurst*, on which the plaintiffs rested their title, was not lost by omitting to revive it, pursuant to the provisions of the state law of 4th of April 1798.

3. Whether the sheriff's sale on the judgment against Hemphill, did not discharge the property sold from all existing liens, and turn *Wilson* over to his action against the sheriff for the purchase money.

4. Whether the plaintiff is not barred by the lapse of time, from 1795 till 1823, during which the purchasers under Hurst were in possession, and no levy made on the premises; and whether the law will not presume the judgment to have been released, so far as it could affect the property thus held.

The first question was made on the admissibility in evidence of the marshal's deed to Mrs Hess, and was elaborately argued on both sides, the court admitted the deed to be read without delivering any opinion, the same point arose as to its effect, and the argument

[Thompson v. Phillips.]

was the same in substance as was made on the objection to its being read to the jury.

On the first question it is unnecessary to refer to the proceedings on Wilson's judgment prior to March 1823.

On the 31st of March 1823 a fieri facias for residue was issued, returnable at April term, on which there was a levy on the lot in question and other property, an inquisition and condemnation returned; on the 19th of April, Mr Todd, on behalf of Mr Newman, under whom the defendant holds, obtained a rule to show cause why the levy and inquisition should not be set aside, on the 30th of April the rule was made absolute by the court. No fieri facias appears to have been taken out afterwards, none was produced, nor was there any entry on the record of one having issued. But the plaintiff produced an inquisition, taken on the 18th of October 1823, to which the fieri facias of March was attached with a levy thereto annexed, embracing the same property as was before levied on.

The property levied on was condemned by the inquest, the fieri facias and a levy were returned with the inquisition on the 20th of October 1823, as appeared by an indorsement thereon in the pencil mark of the clerk of the court.

The plaintiff also produced a notice of the holding the inquisition, which was served on Mr Todd, who attended at the first day, but not at the adjournment on the 18th, as testified by the marshal. Mr Todd on being called, testified, that he was not present at the inquisition; having discovered that the marshal had no writ, and consulted Mr Binney, they concluded that it was not necessary.

At the time of the sale by the marshal, Mr Todd, on behalf of Mr Newman, gave notice that the validity of the sale would be contested for want of a fieri facias and levy.

On the second question arising under the law of 1798, the following entries on the record are all which are material to be stated.

The judgment of Wilson v. Hurst was entered on the 11th of April 1791, a capias ad satisfaciendum was taken out on the 19th of September, returnable to October term 1791—returned non est inventus; no further proceedings took place till the 23d of April 1805, when a scire facias, returnable to October term 1805, was issued against Charles Hurst, and returned served. No notice appears to have been served on the terre tenants, though the lot was then, and had for ten years been in possession of persons claiming by purchase from Charles Hurst.

[Thompson v. Phillips.]

The first section of the act of 1798 declares, "that no judgment now on record in any court within this commonwealth, shall continue a lien on the real estate of the person against whom the same has been entered, during a longer term than five years from and after the passing of this act, unless the person who has obtained such judgment, or his legal representatives, or other person interested, shall, within the said term of five years, sue out of the court wherein the same has been entered, a writ of scire facias to revive the same."

The third section provides, "that all such writs of scire facias shall be served on the terre tenants or persons occupying the real estates bound by such judgments, and also where he or they can be found, on the defendant or defendants, his or their feoffor or feoffers, or on their heirs, executors or administrators." 3 Smith 331, 332.

The third question arising on the effect of the sheriff's sale in 1814, 1815, depended on the construction of the act of 1705, for taking and selling lands on execution pursuant to judgments and mortgages. The regularity of the sheriff's sale on the judgment against Hemp-hill, was not questioned; its effect turned on the fourth section of that law, which declares, that lands sold under execution shall be held and enjoyed by the purchaser, "as fully and amply, and for such estate and estates, and under such rents and services, as he or they for whose debt or duty the same shall be so sold or delivered, might, could or ought to do, at or before the taking thereof in execution." 1 Smith 59.

The fourth question turned on the general principles of law, applicable to legal presumptions from the lapse of time.

Mr Sergeant, for the plaintiff, on the first question.

The plaintiff's claim is founded on a marshal's deed, duly acknowledged after a regular sale on a venditioni exponas, issued after a fieri facias, levy and an inquisition of condemnation. The defendant had notice of the levy, inquisition, and all subsequent proceedings, but made no objection to the acknowledgement of the deed, though he had every opportunity of doing so. Had he made his objections in time, the sale, if illegal, might have been set aside without prejudice to the purchaser; now having paid the purchase money, the land and money are lost if the objection prevails. Such conduct may make the plaintiff's title good, though it would have been bad otherwise. *Willing v. Brown*, 7 Serg. & Rawle 467.

The only defect relied on is the want of a new fieri facias and

[Thompson v. Phillips.]

levy, after the first levy had been set aside on the motion of Mr Tod. The court were not asked to set aside the fieri facias; none of the exceptions applied to the levy on the property in question, and if it were necessary to support the subsequent proceedings, the court would amend their order setting the levy aside, so as to set aside such parts only as come within the exceptions, or would so construe the entry as not to affect such part of it as was necessary to support the subsequent proceedings.

A fieri facias returned with a levy is properly executed, the setting aside the levy has no effect on the fieri facias, its efficacy remains, and its exigency may be performed after the return day; the law is settled that an inquisition may be held at any time afterwards, and there is no decision that a levy may not be attached to the fieri facias after the return. In *Burd v. Donsdale*, 2 Binn. 80, there was no levy in fact, none was attached to the proceedings, and the venditioni issued contrary to the order of the court setting the levy aside, which was to levy anew, and which was not done. Here was a levy in fact, attached to the fieri facias, returned to the court with the inquisition before the venditioni issued; the defendant's objection is thus narrowed down to the want of an alias fieri facias, the only use of which would be an accumulation of costs. In *Miller v. Milford* it is settled, that an alias fieri facias is not necessary where the act can be done on one which is returned. 2 Serg. & Rawle 35.

A levy on land, under the execution law of this state, is different from a levy on goods, no seizure or entry on the land is requisite, it may be done on paper, by the sheriff designating the property on which he intends to hold the inquisition; the law requires notice of the time and place of holding the inquisition, which must be on the premises levied on, if requested by the party. The levy is a mere formal act, one which must precede the inquisition, in order to ascertain the rents and profits of the property selected to satisfy the execution; it is of no importance to the defendant, whether this selection is made by the sheriff before or after the return of the fieri facias. If the land is improved it cannot be sold under the fieri facias, there must be an inquisition finding the rents and profits insufficient to pay the incumbrance on it in seven years; this is the important act on which the power of the court to order a sale depends, and the only one by which the defendant can be injured; if this can be done after the return of the fieri facias, a fortiori, the mere act of form pre-

[Thompson v. Phillips.]

paratory to it can be. When the sale is ordered, it is not on the *feri facias*, but a new writ of *venditioni exponas*; the levy returned with the inquisition is a part of it, when or how it is made is no matter of inquiry, it is enough if the court see that the inquest have acted on the specific property. There must be a levy in form, but it will always be presumed in support of proceedings which depend upon it, unless the contrary appears. 11 Johns. Rep. 517; 17 Johns. Rep. 13, 17; 19 Johns. Rep. 345.

The *venditioni* issued in this case is a recognition by the court of the existence of such a levy as authorized the inquisition; the omission to take out an alias *feri facias* was, if any defect, a mere irregularity, or at the most an error in the proceedings of the court, which was cured by their judicial act in receiving the acknowledgment of the marshal's deed. Their proceedings are good till reversed, being voidable only if erroneous and not valid, the title of a purchaser is not affected by the reversal, by the principles of the common law, which are affirmed in the provisions of the act of assembly of 1705. 1 Smith 61; the defendant obtains restitution only of the money for which the property sold; the purchaser is also protected though the judgment under which he buys is fraudulent. 3 Cranch 306.

The alleged defect in this proceeding being one of mere form, in a matter which the consent of parties could cure, and of which the defendant could have availed himself, as he had full notice, he shall be deemed to have assented to the levy on the old *feri facias*, or to have waived the irregularity; the time is passed when he ought to be heard, as his silence has led to the sale and the payment of the money by the plaintiff; the case thus comes within the principle of *Willing v. Brown*. But there is neither irregularity or error in the proceeding, the court had complete jurisdiction of the case, the parties, and full power to order a sale of the property; their acts are reversible for irregularity only by themselves on motion, or by a superior court on a writ of error; they will be presumed to have done what they had power to do, and to have done every thing necessary to bring the power to sell into action. After this power has been exercised their proceedings cannot be examined collaterally on any other ground than the want of jurisdiction. *Thompson v. Tolmie*, 2 Peters 157, 162; *M'Pherson v. Gunliffe*, 11 Serg. & Rawle 411; 11 Mass. Rep. 221.

The want of an alias *feri facias*, or the time of making a levy, is

[Thompson v. Phillips.]

not a thing which affects jurisdiction or power; the mandate of the writ is not to levy or hold an inquisition, it is to make the money out of the land; the power to hold the inquisition after the return of the fieri facias continues in force, the levy is a mere preparatory act, which does not, as in the case of chattels, give the sheriff any right of possession or property. The fieri facias was the authority to the marshal to do all acts preparatory to a venditioni, he returned a levy which was good except in two particulars, for which it was set aside, he then strikes from the levy the objected matter, attaches the remainder to the fieri facias, and holds the inquisition. Thus connecting what had been done before the return, with what followed, the whole proceeding is strictly regular, according to the principles settled in 2 Serg. & Rawle 161, 162; 8 Serg. & Rawle 380.

The direct order of the court would cure any irregularity as to the time of levy or sale, the sheriff may sell after the return of the venditioni if the land is put up on the return day, 2 Binn. 80; 1 Serg. & Rawle 92, or during the first week of the term, if there is an usage to that effect in the county. 10 Serg. & Rawle 261.

Here the execution was begun to be executed before the return, it was defectively done in part, when the defect was remedied, the subsequent acts of the marshal become connected with the first, so as to make a good and perfect levy for all the purposes of the law. But the conclusive answer to all objections to a sheriff's sale, which do not reach the jurisdiction and power of the court, is that they are cured by the acknowledgement of the deed; this is a judicial act, a judgment affirming all previous proceedings, which remains binding on all parties till reversed.

On the second question. Independently of the act of 1798, the lien of a judgment continues till satisfied by payment, or such a case arises as from length of time raises a presumption of payment, which the jury may find on a plea of payment. In this case the proceedings on the judgment of Wilson, preclude such presumption.

It was of record, every person who could be affected by it was bound to take notice of it, it bound all the real estate of the defendant, Hurst, in the district for twenty years; whether the present defendants had notice, in fact, or not, the law presumes they had notice of the judgment, and all its consequences, as of a deed duly recorded.

The words of the law show that it was so viewed by the legislature, in the preamble "suffering judgments to remain a lien an in-

[Thompson v. Phillips.]

definite length of time," and the old law prevails in all cases which are not embraced by the provisions of this act.

It had been settled by the supreme court in 1809, that if an execution has issued within a year and a day from the entry of the judgment or stay of execution, so that the plaintiff could have an alias execution, without a scire facias under the statute of Westminster 2, the judgment remains a lien without a scire facias under the act of 1798. *Young v. Taylor*, 2 Binney 218. Though the fieri facias is not returned, the judgment is kept alive by the entry of continuances on the roll with the entry of *vice comes non misit breve*, and an alias fieri facias has thus been held good after eleven years from the issuing an original not returned. *Lewis v. Smith*, 2 Serg. & Rawle 160. The court construe the act of 1798 by the rules applied in England to the statute of Westminster; any execution which shows that the money was not paid when it was issued, rebuts the presumption of payment after the year and day, saves the necessity of a scire facias, and authorizes an alias. 1 Archb. Pr. 256; *Pennock v. Hart*, 8 Serg. & Rawle 376. As a *capias ad satisfaciendum* issued on this judgment within the year and day, the case comes within the settled construction of the law of 1798. But this law does not apply to the courts of the United States, they are not courts of record in this commonwealth, nor did the legislature ever intend to interfere with their judgments, over which, or the proceedings of the court, they have no control. This judgment when entered, had by the laws then in force a lien indefinite as to time, which no state law can diminish or affect; state laws prescribing rules of title and property are binding in this court, but this law prescribes the issuing of certain process on judgments, in order to continue their lien, it is therefore a process act not binding on this court. *Wayman v. Southard*, 10 Wheat. 20; *Bank U. S. v. Halstead*, 10 Wheat. 51. Though it has been in force for more than thirty years, it has never been acted on or adopted in this court; in the only case which has arisen under it, it was held not to apply between judgment creditors, but only to purchasers and mortgagees, for whose protection and security it was passed. *Hurst v. Hurst*, 2 Wash. 73. In that case this law was set up by Wilson, the plaintiff, in the judgment now before us, to bar a previous judgment obtained by Brownjohn in the supreme court of the state, who, as was alleged, had lost his lien for the want of a scire facias. The contest was between that judgment and the present one, which was entitled to the proceeds

[Thompson v. Phillips.]

of a sale by the marshal, of the property of Charles Hurst; the court directed the payment to be made to Brownjohn, because the act of 1798 did not protect Wilson's judgment. As this is a decision of this court on the judgment which is the foundation of the plaintiff's title in this case, it is conclusive upon it, so far as depends on the act of 1798. The law of this court has not become changed by the subsequent decision of the supreme court, in 3 Binney 337, construing the law to apply between judgment creditors. Had it been on a question of property or title to land depending on the law of the state, which had not been construed by the supreme court of the state, the rule in the federal courts is to adhere to their construction, though a contrary one may be afterwards given by the courts of the state, as in *Huidekoper v. Douglass*, 3 Cranch 1, &c. Since the decision of that case, there has been a radical difference between the federal and state courts respecting the title by warrant under the law of 1792.

On the third question. The plaintiffs in the judgment of *Wilson v. Hurst*, are foreigners, who have a right to demand in this court, the assertion of their rights by the law of the federal courts, as they existed at the rendition of the judgment in their favour. The conveyance by Hurst could then vest no title, not subject to this judgment, until it is paid, Wilson could not be affected by any proceedings in the state court, of which he had no notice, nor was he bound to inquire into their proceedings, unless in some way brought in by notice.. He had a lien on this property, which Charles Hurst could not divest or impair by deed, or the confession of judgment; this lien could be enforced by a sale under the judgment, the effect of which is to pass the title of Hurst, as he had it at the time of the judgment rendered. The deed of the marshal, is his deed by operation of law, so declared by the supreme court of the state, as the result of the sale and acknowledgement of the sheriff's sale.

By the fourth section of the act of 1705, the purchaser holds the same estate as the defendant in the execution, but no greater, it is subject to all incumbrances which were upon it, at the time of the judgment on which it is sold, no other estate would pass by the deed of the defendant, and the sheriff cannot convey what the defendant could not. The acts of the law are substituted for the act of the defendant in the judgment, in order to pass against his consent, the estate he held, to the same extent to which he could convey it vo-

[Thompson v. Phillips.]

luntarily ; the power of the sheriff is made precisely what the power of the defendant was, when the judgment was rendered, which put the sheriff, by operation of law, in his place for the purposes of a sale, but gave him no power to divest a prior lien.

That the prior lien gives the right to prior satisfaction, is an universal principle of law, it can be divested by no process or sale under a subsequent incumbrance, the right as acquired by the purchaser, remains subject to the prior lien, under which the property barred may be sold and held, notwithstanding a former sale under a junior incumbrance, *Scott v. Rankin*, 12 Wheat. 177. This principle covers the present question, and the decision of the supreme court is a rule for this, though state courts disregard it ; the jurisdiction of the federal courts is complete, *per se*, and cannot be affected by any proceedings in state courts, which tend to impair or take away the lien and effect of their judgments.

On the fourth question. There is no ground for any legal presumption of payment, satisfaction or release of this judgment ; the plaintiff has been guilty of no laches, or done any act of which the present defendant can complain, or of which he had not express notice in time to avail himself of it. He stands in no better situation than Lang, under whom he purchased would, if now in possession. When Lang purchased in 1795, the judgment of Wilson was undoubtedly a lien on the property, of which Lang was bound to take notice, and the law presumes him to have the same notice, as of a recorded deed from Hurst to Wilson. Lang improved at his peril, he ran the risk voluntarily, and those under him down to the present defendant, have continued to remain inactive till this suit.

In October 1823, Newman knew of the levy and inquisition on this lot, he never asserted any claim to be exempted from its effects, but rested on the technical objection to the fieri facias and levy. If under such circumstances the principles of a court of equity could be applied, he would now be prevented from setting up any presumed release, his silence and acquiescence would bind him.

On the other hand, the judgment creditor has proceeded with all the diligence which the law required, he has acted by the order and under the process of the court, who have given a judicial sanction to every thing done, by receiving the acknowledgement of the marshal's deed. After this act, the court can make no presumption which would in any manner invalidate the deed or impair its legal effect ; for that would be to presume in opposition to their own judg-

[Thompson v. Phillips]

ment, affirming all that had been done, which is tantamount to a prior order. A release of one defendant in a judgment, or of a part of the property bound by it, would be a release of the whole, which cannot be presumed without affecting the judgment as to other parts, to which there can be no pretence of abandonment. A partial release can now be given under the act of 1820, which alters the common law and must be confined to the case provided for.

There is therefore no circumstance to authorize the presumption, that the judgment creditor has done any act which can deprive him of the legal effects of his judgment, or affect injuriously the rights of a purchaser, who has paid his money on the faith of judicial proceedings deliberately sanctioned by the court, in receiving the acknowledgement of the marshal's deed.

Mr Tod and Mr Binney, on the first question, for the defendant.

As no new fieri facias issued after the April term 1823, all subsequent proceedings under the judgment of Wilson are void, and the fieri facias previously issued was returned, and all proceedings under it set aside. It must, therefore, be considered as not having been executed, or its execution as not having been begun before the return day, and comes within the well established rule, that if no act is done towards the execution of a fieri facias, before the return day, nothing can be done afterwards, though, if execution be begun before, it may be completed after the return. 6 Mass. 20; 2 Caines 244. After the setting aside the former levy, no new one could be made, as the marshal had no writ to authorize it, this brings this case within that of Burd v. Donsdale, in which the supreme court of the state decided, that where a levy had been set aside, and a sale was made without a new one, the sale was void for want of authority. 2 Binn. 80.

This defect is not cured by Mr Tod attending at the inquisition pursuant to notice, the object of the inquisition was merely to ascertain whether the rents and profits of the land would pay the incumbrances in seven years; the judgment creditor held it at his peril, it was void if the marshal had not a fieri facias in his hands, and had made a levy under it, and the purchaser is bound to look to the authority of the marshal to sell under a judgment.

The mandate of the fieri facias having expired, the marshal had no control over it after its return to the court, his taking it out of the office could give him no new authority, nor could the court order

[Thompson v. Phillips.]

it to be executed anew ; there must be a fieri facias duly executed, and a venditioni exponas to make the sale valid. The levy is an indispensable part of the execution of the fieri facias, according to *Burd v. Donsdale*, and the writ cannot attach to the land without it ; it is the declaration and act of the officer, that he has taken specific property for its satisfaction, without doing which he can proceed no further. The inquisition is no part of the mandate of the writ, but must come after it has been spent by the levy, unless the land is unimproved, or the interest of the defendant such as may be terminated in less than seven years, as an estate for life or in tail. If the land is held in fee and improved, the levy is the only act which can be done under the fieri facias, the inquisition is directed by law, as a foundation for a liberari facias or a venditioni, according to the finding of the inquest. Hence the necessity of a levy, and it may be presumed from facts, as in 11 and 18 Johns Rep., referred to in the argument on the admission of the deed ; but this shows the rule to be, that there must be one or there is no need of presumptions.

It must be made before the return of the writ, and if made without a writ, it is void. *Saxton v. Wheaton*, 4 Wheat. 503 ; the last day for its execution is that of its return, a levy afterwards is void for the want of authority, *Vale v. Lewis*, 4 Johns. Rep. 456, the sheriff is a trespasser, and no title passes to the purchaser in such case ; *Devoe v. Elliot*, 2 Caines's Ca. 244 ; *Prescott v. Wright*, 6 Mass. 20.

An inquisition may be held after the return, where the levy is made before, for it is the completion of the requisition of the law, but the universal practice of taking out an alias fieri facias, when no levy has been made on a former one, shows the necessity of doing it, else why take out an alias in any case.

In this case the record is complete, there is no allegation of mistake, or room for presuming an alias or a levy, for the old fieri facias and levy are returned with the inquisition, as the authority under which it was taken, and must be deemed the only authority existing. A writ of levari facias de bonis ecclesiasticis, is a continuing writ, on which the sheriff may levy from time to time, but if he returns it his power ceases, 2 H. Bl. 582 ; so of a habere facias on a recovery in ejectment, *Runn. on Ej.* 434

The want of a fieri facias and levy are not irregularity or error, as forms and modes of proceeding, which are cured by the acknowledgment of the marshal's deed in open court ; these defects are fatal to

[Thompson v. Phillips.]

the authority of the marshal, which the court cannot cure by their order to the marshal to proceed on the old writ, the court can act only by a new writ issued according to law. This case is in a court of law, in which no consideration of an equitable nature, arising out of the notice to Mr Todd, and his appearing at the inquisition on behalf of Mr Newman can be listened to, the plaintiff must make out a legal title.

But in this case, after thirty-five years' possession, he can have no equity to disturb the defendant, even if this court could act on the principles of equity in an ejectment. We do not question the general principle, that a purchaser of real estate, under the process of a court which has jurisdiction of the cause, and power to order the sale, shall be protected, nor is he to suffer by the irregular proceedings or errors of judgment in the court. But our exception to this deed and its legal effect is, that there was a want of authority in the court to proceed to a sale without an execution, or which is the same thing, on a dead and void fieri facias, which was a mere nullity after its return; the defect was radical, as it left the marshal without a shadow of authority. No subsequent act of the court, in accepting the inquisition and ordering a venditioni, could operate retrospectively, so as to supply the want of an original authority in them or its officer, to divest the title of the defendant in the judgment. The power of the court to sell, is only in virtue of a fieri facias and levy, by which their power is brought to bear on any piece of property, it must fasten upon it, and remain so during the whole process of sale, from inception by levy, to the confirmation by deed acknowledged.

A venditioni is process to complete the execution of the fieri facias, levy and inquisition; it is void if either are wanting; though a sale is made and deed acknowledged, it passes no title, *Burd v. Donsdale* covers this case; it was a sale under a venditioni after a levy had been set aside, and no new one appearing to be made, the court would not presume one. On an inspection of this record, there appears no act or order of the court, in any way approving the acts of the marshal; the whole proceeding, subsequent to April 1823, was the act of the plaintiff in the judgment. We neither admit or deny the power of the court to order a new levy on a returned fieri facias, but as no such order appears, and the record is complete, none can be presumed, and we have a right to consider that none was made. This defect was never waived; the notice given at the time of the

[Thompson v. Phillips.]

sale, showed our intention to contest the sale on this ground, and Mrs Hess purchased at her peril.

On the second question. The act of 1798 covers this case in all its parts. There was no scire facias till after the expiration of seven years after the passage of the law, and when one was issued, it was not served on the terre tenants, or any notice given to them. This law applies to judgment creditors, as well as purchasers, 3 Binney 347; it is a law respecting property and rights, which is as much a rule for the courts of the United States, under the thirty-fourth section of the judiciary act, as for the courts of the state; as a part of the system of state jurisprudence respecting the lien on land, and the mode of selling it on execution, it is a rule of property and title, not of process or remedy, and this court is bound by it as a general law. 1 Peters 485; 3 Wash. 332; 1 Gall. 5.

The subject matter is one peculiarly proper for state legislation, and it is important that there should be an uniformity between the rules of all courts respecting the lien of judgments, which cannot be preferred if state laws do not regulate it, for congress have no power to legislate on judgments in state courts.

No act of congress gives a lien on a judgment, it depends solely on the law of the state, a judgment is enforced in this court by the laws of the state; the legislature may repeal the whole system, by which the proceedings on judgments of this court, would be suspended till congress would interfere. The thirty-fourth section is not confined to state laws then in force, but extends to all subsequent ones, affecting the rights and transmissions of property, and the supreme court pays such respect to state laws, and their construction by the courts of the state, that they will postpone a decision of a case arising on them, to await the judgment of the state court on the question. Bank of Hamilton v. Dudley, 2 Peters 524. This and the supreme court have always been governed by the intestate law of 1794, and the law which regulates proceedings in orphans' courts.

The effect of this law is in the nature of an act limiting and abridging a right before indefinite, to five years without a scire facias; a limitation on the lien of judgment, not an act devising the form and mode of process to enforce it. It prescribes a condition, on which alone real estate within the state shall continue bound by a judgment, which the state is competent to do, and which becomes a rule of decision for this court, in giving judgment on a right of property accruing by a judgment.

[Thompson v. Phillips.]

The supreme court are governed by state limitation acts, on all subjects, *Bell v. Morrison*, 1 Pet. 355; *M'Cluny v. Silliman*, 3 Pet. 270; so of recording acts or those for quitting titles and possessions. *Hort v. Lamphire*, 3 Pet. 289, 290, the law of 1798 partakes of all these characters, and is a most salutary one for the protection of creditors and purchasers against dormant and inactive judgments. It extends in terms to the judgments of this court, which are of record in this commonwealth, and has the same effect on a right depending on them, as if the case arose on a contract or deed. Though it was once held in this court, that the law did not apply between judgment and judgment, but only between a judgment creditor and a purchaser; yet the supreme court of the state have held otherwise, and their decision on a local statute is binding under the thirty-fourth section as a part of the statute. 12 Wheat. 162. This is not the case of a creditor, however, the defendant is a purchaser under the sheriff's sale of the right of Hemphill, and stands upon his deed from the sheriff. It only remains to inquire whether the plaintiff has done any thing which can be deemed a substitute for the scire facias, as a substantial compliance with the terms of the law.

The plaintiff has failed in establishing any analogy between this act and the statute of 2 Westminster; the objects and remedies of which were different. The English practice of entering continuances of *V. C. N. M. B.* on the roll, though adopted in the state court, would not be sanctioned if the question was *res integra*. 13 Serg. & Rawle 149, it has never been adopted in this court, and is so utterly inconsistent with the words and spirit of the law, that it ought to be repudiated. An entry of non est inventus on a capias ad satisfaciendum, or of *V. C. N. M. B.* on the roll of a fieri facias not returned, can be no substitute for the scire facias, and notice to the terre tenants, expressly directed by the law. The statute of 2 Westminster prescribes no such notice. Courts were thus left at liberty to devise a substitute, but here there can be none: purchasers cannot be protected without notice to inform them of what property was held bound by the judgment, this was the great object of the law; *Hurst v. Hurst*, 2 Wash. 77; whereas, the statute of Westminster applied only to the parties to the judgment, the plaintiff's construction would make a capias ad satisfaciendum returned non est inventus, or a fieri facias not returned, equivalent to a scire facias, actually sued on a purchaser terre tenant. The supreme court of the state has never sanctioned this doctrine, and it cannot be the law of this court.

[Thompson v. Phillips.]

On the third question. The defendant claims under a purchaser from the sheriff, by a deed acknowledged, which, according to the construction by the supreme court of this state of the fourth section of the act of 1705, gave the purchaser a title disencumbered from all previous judgments against the person as whose property it was sold, as well as all those from whom the title passed to him. This was the principle decided in the Commonwealth use of Gurney v. Alexander, by which the law on this subject was finally settled in 1826, after remaining long doubtful. 14 Serg. & Rawle 257, &c.

It had been previously settled, that a sale under an order of the orphan's court, discharged the land from all judgments against the intestate, by the provisions of the law of 1794; Moliere v. Noe, 4 Dall. 450; both of which decisions were in accordance with the general opinion and practice of the bar.

The same rule has been applied to a legacy charged on land, unless the land is sold subject to the legacy. Burnett v. Washebaugh, 16 Serg. & Rawle 410.

The case of a mortgage stands by itself, and is thought not to come within the principle, though it has been decided otherwise in Willard v. Norris.

There can be no doubt, that it was in the power of the legislature to prescribe the effect of a sheriff's sale, nor that the construction of the act of 1705, as finally settled by the court of the last resort in the state, is a binding decision on this court. The case of Rankin v. Scott, 12 Wheat. 179, was decided on the local law of Missouri; it must be taken as the law of that state; though it may be correct in the general principles it asserts, it cannot control the law of this state as judicially settled. The local laws of every state are held to be binding as rules of property, whether they are those of usage or legislative enactment. 12 Wheat. 162.

The great inconvenience of conflicting decisions on the construction of a state law, especially one on which so many titles depend as that of 1705, is a powerful reason for the acquiescence of the federal court in the settled course of state adjudication on local statutes.

On the fourth question. The plaintiff suffered the defendant and those under whom he claims, to take and hold the lot in question, and cover it with valuable improvements, without giving him or them notice, that he intended to hold it liable to his judgment, till after the expiration of more than thirty years from the entry of his judgment. In a court of equity every presumption would be made against

[Thompson v. Phillips.]

a claim so stale, 1 Mad. Ch. 79, 90; 2 Ves. 13, 280; 2 Ves. Jun. 583, the plaintiff would be bound by his silence and acquiescence; 1 Fonb. 151, though the lapse of time is itself no limitation, it is so by analogy to the statute.

This principle of equity is applied by courts of law in instructing a jury to presume any fact which will bar a stale demand, it is an universal one, 2 Atk. 144, applying to all acts which the law can presume to have been done, the evidence of which has been lost by accident, or obliterated by time. The ground of the presumption is not the belief or proof of the act, it stands in place of specific or individual belief, as a rule indispensable for the peace of society and the security of possession, 12 Ves. Sen. 252, 265; 6 Wheat. 604; *Prevost v. Gratz*, 2 Saund. 175, 176. Any act necessary for this purpose, from a deed to an act of parliament, may be presumed; Cowp. 209, 210, 215; and when a legal presumption exists, it is equivalent to direct proof of a fact, or the production of a paper proving it. Payment of a bond is presumed after twenty years, and so of a judgment, mortgage, or rent, 7 Serg. & Rawle 410; 14 Serg. & Rawle 15, 16; 10 Johns. Rep. 414, 417; 4 Cranch 415.

Such presumption is judicial belief, and is matter of law where no circumstances are offered to account for the delay, if evidence is given touching such circumstances, the jury decide on the facts, and the court on their sufficiency in law, to take the case out of the principle of presumption. 9 Serg. & Rawle 382; 14 Serg. & Rawle 21; 7 Serg. & Rawle 410.

Presumptions are applied not only to acts which extinguish, but to those which grant or create rights of property, as a right of way; 3 East 294; of a landing; 2 Ball & B. 667; to open windows; 2 B. & Cress. 686; the use of a water course; 10 Serg. & Rawle 63.

In all cases where the act of limitation bars an ejectment, any collateral right to land will be barred by the legal presumption as matter of law; it may be left to the jury to presume on less than the period of the statute. Here thirty-two years have elapsed from the date of the judgment, and twenty-eight from the purchase and possession of the defendant, the law will presume the judgment paid, satisfied or released, as to this property, on the same principle that possession by the mortgagor for twenty years, bars the right of the mortgagee to the money, and possession by the mortgagee for the same time, bars the equity of redemption. The law presumes a release of the lien of the mortgagee on the land in the one case, and

[Thompson v. Phillips.]

the lien of the mortgagor on the legal estate of the mortgagee in the other. 7 Johns. Ch. 122; 2 Sch. & Lef. 636; 9 Wheat. 497; 3 Pet. 52.

It was competent to the judgment creditor to release the lien of his judgment on this lot; it was a common practice to execute partial releases of liens before the passage of the act of 1820, which expressly authorizes it; that such a release, or some other equivalent act has been executed, will be presumed. The plaintiff offers nothing to rebut the presumption, but rests upon the record to show that the judgment is not satisfied, and that there can be no presumption against it. This may be admitted without impairing the principle for which we contend. It is indispensable for the security of purchasers, under circumstances like the present, for if the judgment can be enforced on property which has been held adversely for twenty-eight years, the possession of one hundred years cannot avail him. As to the property which the judgment creditor has pursued within twenty years, his rights are not affected by any presumption of law; but as to that which has been abandoned, as the present has been, the law will presume him to have done some act which will, in the language and policy of the law, quiet a long and peaceable possession, either by way of release, estoppel, or abandonment.

Mr Rawle, Sen., in reply, was informed by the Court, that they were not desirous of hearing him on the objections to the marshal's deed, he then proceeded to answer the other objections to the plaintiff's title.

This is no case for the doctrine of legal presumptions in favour of any of the persons under whom defendant claims. Lang purchased only four years after the entry of the judgment of Wilson, and for ten years before the purchase of Newman, the judgment continued in active operation by sales of the property of Hurst from time to time. Newman purchased in 1815, only nine years after the judgment on the scire facias in 1806, which was record evidence that the judgment was unsatisfied, conclusive on Hurst and all claiming under him after April 1791, unless collusion or fraud existed. This was legal notice to Newman before he bought, whether he had notice in fact, is immaterial; if he had not, it cannot be presumed that he obtained a release, if he had notice, he has bought with his eyes open. Nor can he claim the benefit of the presumption of payment after the lapse of twenty years, he had been in possession

[Thompson v. Phillips.]

only eight years, when a levy was made on the property he purchased, notice whereof was given to him. The notice given by Mr Tod on the 19th of April, alleges no satisfaction of the judgment, nor did Newman pretend it on the 8th of October following, in his reply to the notice of the plaintiff in the judgment; the complaint in April 1823, was that the burthen on his property is increased by not embracing in the levy all the property bound by the judgment, thus admitting his own to be still bound.

The presumption of payment of a bond, mortgage or judgment, does not attach as matter of law, unless it has been dormant for twenty years; the jury alone can presume it as a fact in less time, under the direction of the court, this is the general rule. 14 Serg. & Rawle 15, 19. But after twenty years, the presumption does not attach; if there are any circumstances legally sufficient to account for the inaction, they will be left to a jury to rebut the presumption 10 Johns. Rep. 414; Dunlop v. Ball, 2 Cranch, 183, 184; 4 Cranch 415; 2 Wash. C. C. 323. In this case there has been no period of twenty years from the entry of the judgment, during which it has been inactive, and the whole record is full of entries, which would rebut the presumption, if there was any colour for raising it.

It was no laches in Wilson not to give notice of his judgment when this lot was about to be sold as the property of Hemphill, it was the duty of the sheriff to look for incumbrances upon it, and of Newman the purchaser to examine the titles, and the liens upon the property. Newman purchased in February 1815, a scire facias issued to revive Wilson's judgment against the executors of Hurst to October 1815, which remained open till July 1817, when judgment was entered. With legal notice of these proceedings, and actual notice of the levy and inquisition in October 1823, Newman neither prayed an audita querela, or moved the court to interfere with the proceedings, as he was bound to do, as was decided by this court in cases arising on the judgment of Wilson, 1 Peters C. C. 140, 269, it was also decided that notice to purchasers or terre tenants was unnecessary. Every presumption which the law can raise is against Newman, and so far from the law presuming the judgment released or abandoned, it conclusively appears that it was in operation with his knowledge, and asserted as a lien on his property, before the law could raise any presumption in his favour, or imputation of laches in the judgment creditor, after his purchase. He will be presumed to have waived his objection to the levy, and admitted the

[Thompson v. Phillips.]

existence of the lien of the judgment to have been a continuing one till that time.

There is no authority in a state legislature to bind this court, the law of 1798 was intended to apply only to the courts of the state, nor could it have been intended, to affect a judgment rendered in a court over whose proceedings they had no control.

Here was a judgment, a *capias ad satisfaciendum* returned *non est inventus*, on which by the settled rule of the common law, as adopted by this court, an execution could be issued at any time without a *scire facias*; no state law will be held to be an order to them to change their established rules, and to annul a judgment, unless revived by *scire facias* in 1803.

The words of the law may be satisfied by confining it to the courts of the commonwealth, and such has been its construction by the bar.

My practice has been to take out a *fieri facias* and keep it in my drawer, when I wished to continue the lien of a judgment in this court, and to enter continuances by *V. C. N. M. Breve*, when desirous to take out an alias *fieri facias*, which could not be done without a *scire facias*, if the writ is returned. It has also been the practice, to search in the office of this court for all judgments, without regard to the law of 1798, which has been considered as a process act, not applicable to the proceedings here. A *scire facias* is process, the time and circumstances under which it must issue, as well as the persons on whom it shall be served, are the modes of proceeding adopted by the court, which it ought not to suffer to be varied by a state law. It will be time enough to do it when the supreme court of the United States shall declare the law to be applicable to judgments here, as was done in 2 Peters 522, this has not been done as to this law, so that the court is left free to act upon its own opinion. The judicial power of the United States is created by the constitution, not the judiciary act, the thirty-fourth section makes the laws of the states rules for the decision of this court, but this has been held to apply as a guide to the judgment to be rendered, not to any proceedings to carry the judgment into effect, state laws on this subject are only acts regulating process. 10 Wheat. 20, 51, &c.

The late decisions of the supreme court of this state, respecting sheriff's sales, will operate most oppressively on judgment creditors in this court, if they are followed here; if a sale on a judgment in any court of common pleas in this district, destroys the lien of a judg-

[Thompson v. Phillips.]

ment in this court, there is no security. The state laws require no notice of a sheriff's sale to be given elsewhere than in the county, and that by advertisement only; no notice need be given the judgment creditors, or other incumbrancers, of the contemplated sale, so that the prior lien of a judgment in this court, may become extinguished without the act of the party, the court, or notice. In a case like the present, all means of protection are unavailing, the property sold under the judgment against Hemphill was advertised in his name; a creditor of Charles Hurst was not bound to know that it interfered with the lien of his judgment. An advertisement in a newspaper is not made evidence as to third persons, it is sufficient notice as to the defendant whose property is to be sold, but cannot impair rights attached to it before it came into his hands. The sheriff searches only for incumbrances against the defendant, the money is appropriated to the eldest lien thus appearing, while the judgment creditor, who has the first pledge of the land against a former owner, is kept in utter ignorance that his rights are in danger until they are lost, as well his lien on the land, as the purchase money for which it sold.

No such rule existed when Wilson obtained his judgment, it has not been adopted in this court, and is in direct contradiction to the rule settled by the supreme court of the United States in 12 Wheat. 177. The supreme court of the state have several times declared that the effect of a sale under a younger judgment, on the lien of an older one, was an open one, 4 Yeates 216; 2 Binn. 218, decided in 1809; no general rule was established till the case in 14 Serg. & Rawle 257, in 1826, long after the rights of the present parties had become fixed.

BALDWIN, J., to the jury.

The first of the important questions which have arisen in this case, and very ably argued, is, whether the sale of the premises in question by the marshal, under the judgment of Wilson v. Hurst, is void for want of an alias fieri facias, and a levy thereon to October term 1823.

If the writ of fieri facias, with a levy on specific real estate, was the only authority to a sheriff to make a sale, and vested him with the possession or right of property therein, this objection would be fatal; for an execution must be in part executed, or its execution be begun, before its return, in order to give any efficacy to subsequent

[Thompson v. Phillips.]

proceedings upon it, otherwise the authority of the officer expires with his writ. But where the fieri facias and levy are only initiatory process, as the foundation of another writ, which is indispensable to authorize a sale, their effect is very different, because the fieri facias operates, when levied, neither to vest a right of property, or confers a power to sell.

The mandate of a fieri facias in both cases is the same, to levy the amount of the judgment, and bring the money into court; the manner of levying on the personal or real property of a defendant, as well as of converting it into money is, however, widely different. In the execution of a fieri facias levied on personal property, the mode of proceeding is regulated by the common law; when levied on land, it is prescribed by the act of assembly of 1705, which authorized the sale of lands on execution. It is therefore necessary to consider the office and effect of a fieri facias and levy, as to the two species of property, in order to decide whether the same rules apply to both.

A fieri facias is plenary authority to sell chattels, a levy under it gives the sheriff a property in them, in virtue of which he may, and is obliged to sell; 1 Salk. 323; 6 Mod. 293; 1 Dall. 313; 11 S. & R. 304; 1 Wash. 38; 11 Wheat. 45; after the levy his property in the goods continues, though the fieri facias is returned he may sell, the court may order him to bring the money into court, issue a distringas or venditioni exponas to compel him to sell, he becomes liable for the money by the levy, if he has made a sufficient one, the goods are his own, and he may sell when he pleases, unless otherwise ordered by the court. 5 Binn. 268, 273; 10 Wheat. 45; 17 Serg. & Rawle 438; 2 Saund. 343, 344; 2 L. R. 1074. When he begins the execution of a fieri facias, he must complete it, his authority continues though he is out of office; 2 Bac. Ab. 366; 4 Day Com. Dig. 234; 1 Salk. 12, 318, 323; 1 Lill. P. Reg. 767, 824; a distringas or venditioni gives no new authority to sell, it is merely compulsory process, 1 Ves. Sr. 196; 4 D. C. D. 236; Sh. Ab. 547; 6 Mod. 295; 1 Dall. 313, to execute a power resulting from the fieri facias, and the right of property by the levy.

As the levy is the operative act, it must be made by an actual seizure of the goods, in whole, or part in name of the whole; the sheriff may seize them by force, 16 Johns. Rep. 288, take, and hold possession; the lien on them attaches when the writ comes to his hands till the return day, without a levy, but if no levy is made

[Thompson v. Phillips.]

before it is past, the lien is lost, and the goods may be taken by a purchaser, or on a subsequent writ. 2 Serg. & Rawle 157.

As to land, the lien attaches by the judgment, and remains though no levy is made on the fieri facias, the sheriff has no right to take possession, or to enter upon it to make a levy, and after levy he has neither the right of possession of property, or power to sell an estate of freehold in the defendant, if the property is improved, and his interest in it is of a nature which must continue for more than seven years, and the rents and profits will pay the incumbrances on it in that time.

In this case the property in dispute was improved at the time of the fieri facias, and held in fee, a levy upon it could give no power to sell, the only further act which the sheriff could do was to hold an inquisition and return it to the court; the fieri facias, and all his power under it, became then functus officio. In case of an extent, he must have a liberari facias to authorize him to give possession to the plaintiff; in case of a condemnation, a venditioni exponas to give power to sell, it is an authority given by the act of assembly, additional to that given by the fieri facias. 1 Dall. 313; 1 Serg. & Rawle 99; 4 Yeates 213, 214.

Hence it is obvious that there is no one particular in which the levy on chattels is analogous to a levy on land, where an inquisition is necessary; as the sheriff cannot enter on the land to make it, no act in pais can be necessary, its office is merely to designate the item of real estate which the sheriff selects for the satisfaction of the debt, on the rents and profits of which the inquisition is to be held, in order to ascertain whether it can be exposed to sale.

By the first section of the law, lands are made liable to be seized and sold by judgment and execution. The second section is a proviso, that when an execution is awarded to be levied upon lands, the sheriff shall not by such execution, or any writs thereupon, sell any lands which are sufficient to pay the debt in seven years, but shall deliver them to the plaintiff, as on an elegit in England. By the third section, which is also a proviso, that if the profits of such lands shall not be sufficient, the sheriff shall so certify on the return of the execution, whereupon a writ of venditioni exponas shall issue to sell such lands, in the manner directed concerning the sale of other lands, which is in the fourth section, enacting, "That the sheriff, by a levari facias, may seize and take all other lands in execution, and with convenient speed, with or without any writ of

[Thompson v. Phillips.]

venditioni exponas, make public sale thereof on giving the notice prescribed, whereupon he shall make a return thereof, indorsed or annexed to the *levari facias*.”

The entire silence of the law as to what shall be deemed a seizure of land, before the inquisition directed in the third, or the sale authorized by the fourth section, shows clearly that the time and mode of seizure or levy were not deemed essential; the second and third sections are conclusive declarations of the legislature, that the *fieri facias* and seizure did not authorize a sale of lands which would pay the debt in seven years. Thus excluding all analogy between the effect of a *fieri facias* and levy on goods, and productive real estate, and leading to the conclusion that the seizure of land was only to describe what the inquest was to pass upon, or the sheriff to sell. What the law deemed essential it prescribed, the holding the inquisition, its return, the *venditioni*, the notice of sale, its return indorsed or annexed, a deed by the sheriff acknowledged in court, and then, to leave no doubt of the effect of such proceedings, declaring, “that lands so sold shall be held by the purchaser for such estate as the debtor held it.” 1 Smith 57, 59. It would be an unauthorized construction of this law to declare, that after every prescribed requisite had been complied with, the sale was void for not doing an act not required, viz. the making a levy before the return of the *fieri facias*.

It cannot be made by any visible, notorious act, or marks on the ground, or by an actual seizure, it must consequently be done on paper, and giving notice to the defendant of the property selected, with the time and place of holding the inquisition, which is all that could be done by the sheriff going to the premises, and proclaiming a levy in fact. No form or mode of making a levy on land, or the time in which it must be made, are prescribed by the act of assembly; every object for which one is required, either to authorize the sheriff to hold the inquisition, or to protect the debtor, is fully answered by notice to him of the levy and inquisition. It is wholly immaterial whether the levy is indorsed upon the writ before or after the return day, if done in a reasonable time before the notice of an inquisition. Without any reason, therefore, for requiring the levy to precede the return, any positive law prescribing any possible effect to be produced by it, or any adjudication of a state court declaring it indispensable to support subsequent proceedings, we cannot say that it is a fatal defect in the plaintiff's title.

The first section of the law is limited and restrained by the proviso

[Thompson v. Phillips.]

in the second, in order to hold an inquisition for the protection of the debtor, yet it prescribed no notice of either a levy or of the inquisition; that was not made necessary till 1806. 4 Yeates 21 ; 2 Binn. 215 ; S. P., 4 D. C. D. 242. It was then directed that for want of sufficient personal property, the sheriff should levy the real estate of the defendant, return his proceedings to the next court, and give notice of the inquisition ; 4 Sm. 331 ; but it required no notice of the levy, or prescribed the mode or time in which it should have been made. It would be strange to suppose that the act of 1705 had made a levy before the return of the fieri facias, indispensable to further proceedings, and that the want of it was fatal to the power of the court to order, and the sheriff to make a sale under a venditioni ; and yet, in 1806, the legislature made no provision for notice to defendant of the levy, while they require it as to the inquisition. The nature and object of the inquisition clearly indicate the intent of both laws, it was the all important proceeding, without which an estate in fee in improved lands could not be sold, the want of it arrested all further proceeding, and notice was prescribed to enable the defendant to show the rents and profits. None was required as to the levy, for the obvious reason that the mode and time of making it had no effect on the rents and profits, and notice of the inquisition specified property on which the inquest was to pass. The construction of these laws by the supreme court tends to the same conclusion, they have always held an inquisition necessary to the validity of a sale, but that it may be held after the return of the fieri facias, though years may have elapsed, and where an inquisition has been quashed for irregularity, a new one may be held without an alias fieri facias ; 1 Dall. 379 ; so a sale after the return of the venditioni is good. 2 Binn. 91, 92 ; 1 Serg. & Rawle 98, 99 ; 10 Serg. & Rawle 261. Though the law directs the return of the inquisition and venditioni, the omission to make it does not affect the validity of the sale. 1 Rawle 96, 97, if property is condemned at the suit of A, it may be sold on a venditioni at the suit of B, without a new inquisition. 1 Serg. & Rawle 92, 97, 98, 100.

In this case there was a fieri facias and levy before the return. The levy was set aside as irregular, but a new one could be made under it on the same principle which applies to the new inquisition after quashing an irregular one ; whether this was done by correcting the first levy, adopting it as to the property in question, is immaterial. The court had the power to order a new or amended levy

[Thompson v. Phillips.]

on the old fieri facias, or might adopt and sanction the act of the marshal on the return of the inquisition with the fieri facias and levy, it was not a matter affecting the power or jurisdiction of the court, but related to the execution of their process, of which they had the right of judging and directing the marshal. 10 Wheat. 45, &c. ; 1 Serg. & Rawle 101.

On the return of the inquisition the court issued a venditioni, reciting and adopting what had been done, this is a mandatory writ, which the marshal was bound to obey by a sale, it is the writ of the court, its order, not that of the party who sues it out, having the same efficacy whether issued on a præcipe of an attorney or by special order on motion.' It justifies the marshal in its execution by a sale, and passes the title to the property sold, if the court has jurisdiction and power to order a sale. But if the proceeding was irregular it can be corrected only by the court on motion, or, if erroneous, by a writ of error: neither the irregularities or errors of a court will affect the title of a purchaser, under their process, where their power to order the sale has arisen. A superior court may revise their proceedings by their appellate power, if a writ of error or an appeal is presented within the time prescribed by law ; but if that time has expired, a judgment or execution cannot be reversed, however erroneous. Though personal property is sold on an execution which has issued contrary to an express act of congress, the sale is valid. *Blaine v. The Ship Charles Carter*, 4 Cranch 328, 333. The purchaser is protected by a settled principle of jurisprudence, that the proceedings of a court of competent jurisdiction cannot be called in question collaterally, when they cannot be examined directly. This is a rule indispensable to the security of property, held by sale under judicial process, especially applicable to the sales of real estate by execution in this state. (Vide 10 Peters 473, 478, acc.)

The defendant, or any person claiming under him, has every opportunity of calling into question the regularity of the proceedings, by an application to the court before the sale ; he may object to the acknowledgement of the deed, when the court will set the sale aside, if they are irregular or erroneous, and he may have his writ of error. If there is just cause for either, justice can be done to the party complaining, without injury to any party ; if the sale is set aside, the purchase money is refunded, or its payment not exacted, if the judgment is reversed, the purchaser is protected by the common law and

[*Thompson v. Phillips.*]

the act of 1705, and restitution of the purchase money only is awarded. Whereas if the sale can be avoided in a collateral action, the grossest injustice is done to the purchaser, he loses both purchase money and land, and the defendant whose debt has been paid by the sale, holds the land without any obligation to refund. Hence has resulted the rule adopted in all courts, that in a collateral action, the only open question is, the jurisdiction and power of the court to order the sale, 2 Peters 160; 11 Serg. & Rawle, 424; if the writ justifies the officer in its execution, a sale under it is valid. 10 Coke 76, *a, b*; 1 Ves. Sen. 195; (5 Peters 370; 10 Peters 473, *u.*).

In this state, the reception of an acknowledgement of a sheriff's deed is a judicial act, in the nature of a judgment of confirmation of all the acts preceeding the sale, curing all defects in process or its execution, which the court has power to act upon. (Vide 10 Peters 472, 476.) When the acknowledgement is once taken, every thing which has been done, is considered as done by the previous order, or subsequent sanction of the court, and cannot be afterwards disaffirmed collaterally. 1 Serg. & Rawle 101; 4 Yeates 214; 6 Binn. 254; 2 Serg. & Rawle 54, 55.

The court which directs the sale, can alone judge of the legality of acts done under its authority, 1 Serg. & Rawle 101; 2 Serg. & Rawle 54; it follows, that all questions arising on judicial sales, when their validity is questioned in an ejectment, must be those of authority, not of irregularity, or error in awarding, executing, or confirming process, or acts in pursuance of it. If the power of the court is once brought into action, no tribunal can declare their proceedings nullities; if an act is necessary to be done before their power to sell can be exercised, it will be presumed they had evidence of it unless the contrary expressly appears; as the existence of debts and of minor children to support a sale by order of an orphan's court, 11 Serg. & Rawle 424; 2 Peters 161; or a levy on land to support a sheriff's sale. 11 Johns. Rep. 517; (10 Peters 473, *acc.*)

It has been much pressed on us, that a contrary principle is established in *Burd v. Donsdale*, and *Saxton v. Wheaton*, but we think them perfectly in accordance with our views of the law. In the former, the levy had been set aside by the court with directions "to levy anew," a sale was made without any new levy, which the court declared void expressly on the ground, of "the venditioni exponas having issued contrary to the order of the court." 2 Binn. 92. In *Saxton v. Wheaton* the sale was made under the *feri facias*,

[Thompson v. Phillips.]

which authorized a sale of land by the law of Maryland in force in the District of Columbia, (without any other process or the acknowledgement of the deed to the purchaser), in the same manner as the sale of a chattel. The levy then was the all important act to authorize the sale, and as in the case of goods must be made before the return, according to the construction put on the law of Maryland, 4 Wheat. 506, though it is no authority for a similar construction of the law of this state, which is widely different.

It is therefore our opinion that the defendants have failed in sustaining their first objection to the plaintiff's title.

The next objection is, that the lien of Wilson's judgment having been lost for the want of a scire facias, under the act of 1798, the marshal's sale gave no title to the property in controversy. The terms of this law extend to all judgments, in any court of record within this state, which are broad enough to take in those in this court; its object is declared to be "to prevent the risk and inconveniences to purchasers of real estate, by suffering judgments to remain a lien for an indefinite length of time, without any process to continue or revive the same," which apply in whatever court such judgments are rendered. We cannot consider it as a mere process act, it is a part of a great system of jurisprudence, for the safety and protection of purchasers, from secret or dormant incumbrances or deeds, long adopted, and amended from time to time, as occasion required existing evils to be remedied by supplementary provisions. No form of process is prescribed for enforcing a judgment, the plaintiff is required to do certain acts to continue the lien of his judgment, partaking of the nature of an act of limitations, a recording act, or a supplement to the law for docketing judgments, and destroying their lien by relation and compelling an entry of satisfaction. 8 Serg. & Rawle 379. So it seems to have been considered by the court and bar in *Hurst v. Hurst*, 2 Wash. 69, without questioning its application to the federal courts, except as between one judgment creditor and another; that question does not arise here, as the defendant is a purchaser, both under a deed from the defendant in the judgment, and under the sheriff by deed acknowledged in open court. The effect of the law in all cases to which it applies, is to absolve the property from the lien of the judgment, as completely, as in the case of a deed or mortgage not recorded in the time prescribed by the recording acts, a judgment not docketed, or fieri facias not delivered to the sheriff. The questions arising under it are those

[Thompson v. Phillips.]

of property, title, and the rights of purchasers for a valuable consideration, on the faith of a law providing for their case.

It cannot be doubted that in a suit in a state court, this law would be the rule of decision on the rights of the parties; it is difficult to perceive a reason why a different rule should be adopted in this court, merely because the plaintiff being a citizen of another state, may bring his suit here or in the state court, at his option. Both courts administer the laws and jurisprudence of the state, the rules of property and title are the same, as well as the mode of transmission by judicial process; all regulated by state laws, there ought to be one uniform course of adjudication upon them. If a judgment which by the law of the state has lost its lien, can be made the basis of a sale by the process of this court, and the sale be held valid to pass the title, so that a purchaser under the defendant, or the judicial process of a state court, cannot avail himself of the protection of the state law, we must adopt this principle. That a judicial sale of real estate in Pennsylvania, which is void by its law, is valid in this court, and a judicial sale, valid to pass the title by the laws and in the courts of the state, is void by the laws of the United States. We do not feel authorized to so decide in a suit at common law, in which the rights of both parties depend on the laws of the state, on a subject matter on which congress possesses no constitutional jurisdiction, nor has in any matter assumed its exercise. There can therefore be no collision between the state laws, and the constitution, laws or treaties of the United States, so that the case comes clearly within the provisions of the thirty-fourth section of the judiciary act. Its application is not confined to state laws in force at its passage in 1789, but extends to all laws which affect the right in litigation at the trial, which prescribe a rule for the judgment to be rendered, embracing the whole subject of the transfer of property, liens upon it, and all consequent judicial proceedings, whether in courts of common law, or special jurisdiction. These are subjects of internal police and state regulation, over which the states have delegated no power to the federal government, on which the states can legislate in any manner, and to any extent, not prohibited by the constitution of the state or the union.

Laws which relate to practice, process, or modes of proceeding before or after judgment, are exceptions to the thirty-fourth section, as congress have legislated on the subject. The supreme court of the United States have established the distinction to be this, state

[Thompson v. Phillips.]

laws, which furnish the court a rule for forming a judgment, are binding on the federal courts, not laws for carrying that judgment into execution, that is governed by the acts of congress and the rules and practice adopted pursuant thereto. 10 Wheat. 24 to 50, 51, 65. This distinction is illustrated in the case of the Bank of Hamilton v. Dudley; the occupying claimant law of Ohio, passed in 1810, was held to be a rule of property and decision in the federal courts, but that they could not carry it into effect by changing their modes of proceeding, as established and regulated by practice and the acts of congress, though the right of the party to the benefit of the law, was not impaired by the inability of the court to act upon it in the manner directed. 2 Pet. 525, 526.

Feeling bound, then, to adjudicate upon the rights of the parties in this case, according to the law of 1798, we proceed to the question of its effect on the judgment of Wilson v. Hunt. A *capias ad satisfaciendum* was issued to October 1791, returned *non est inventus*, without any further proceedings for fourteen years from the date of the judgment, and seven years from the passage of the law, which contains no exception, admits of no construction, or any substitute for the *scire facias*, and its service on the terre tenants, who were purchasers, and for whose protection the law was passed.

It has been strenuously urged by the plaintiff's counsel, that this law admits of the same construction which has been given in England and this state to the statute of 13 Edw. 1, st. 1, ch. 45, 1 Ruffhead 109, directing a *scire facias* where *no* execution had issued within a year and a day, but we can perceive no analogy between them. That provided and extended a remedy, by process, to enforce a judgment, this limits, restrains and annuls its lien, making all process to enforce it of no effect; that cured a mischief putting a plaintiff to a new suit, this protected a purchaser from the mischief of an indefinite lien; that had for its object an award of execution, in virtue of the *scire facias*, this made one indispensable, to save the lien of the judgment for a term of five years. Vide 3 Rawle 12, 13.

As the statute of Westminster was a remedial one to the plaintiff, it was liberally construed in his favour, so that when an execution had been taken out and not returned, entries on the roll of continuances by *vice comes non misit breve*, would authorize an *alias fieri facias* to issue at any time, on which a levy could be made on real or personal property. Hence arose the opinion that the judgment remained a lien on land, while ever the plaintiff could take out a

[Thompson v. Phillips.]

feri facias; it followed, that the lien of the judgment being as indefinite as the length of the continuance roll, produced the very evil which was intended to be remedied by the act of 1798. A strong illustration of the effect of this construction of the statute of Westminster, if applied to purchasers of real estate, is furnished in the case of *Lewis v. Smith*; a packeted *feri facias* had been continued eleven years, by the entry of *vice comes non misit breve*, after an alias had issued, and the alias was held to have issued regularly. 2 Serg. & Rawle 154, 158. In that case the levy was on personal property only, and so not affected by the act of 1798, had it arisen before its passage, and a levy made on lands in the hands of a purchaser, no one could have doubted the wisdom, justice or policy of the law, for the purchaser would have no means of ascertaining from the record what was due on the judgment at the time of his purchase, and have continued exposed to every inconvenience which the legislature intended to remove.

If a doubt could exist, whether such a case or the one before us comes within the preamble and the enacting words of the first section, it would be removed by the third, which requires the *scire facias* to be served on the persons occupying the real estate, on the defendant, his feoffees, or their heirs or administrators, &c. It would be a perversion of the law to construe a *capias ad satisfaciendum* issued in 1791, to be a *scire facias* issued in five years after 1798; a return of *non est inventus* to be a service on the terre tenants, the defendant or his feoffees, or a *capias ad satisfaciendum* returned *non est inventus*, to be a *feri facias* continued fourteen years by an entry of *vice comes non misit breve*. No decision of the supreme court of the state has been had, which has settled the construction of this law as to its application to land in the hands of a purchaser, under circumstances like the present, or established any principle which would bring this case within the doctrine of *Lewis v. Smith*. We cannot consider the opinions or declarations of the judges, that the act of 1798 is analogous to the statute of Westminster, to be such an adjudication of the point as makes it our duty to consider the construction of the law to have been settled as a rule of property. (a)

(a) Though the supreme court of this state in *Pennock v. Hart*, 8 Serg. & Rawle 376, and *Commonwealth v. Atkinson*, 13 Serg. & Rawle 146, affirmed the doctrine of *Lewis v. Smith*, yet they declared that if it were *res integra*, without precedent or practice to the contrary, they would not so construe the act of 1798, and cautiously forbore an opinion how far an execution not levied, and no actual renewal

[Thompson v. Phillips.]

In this court the question is entirely open, and being free to decide upon our views of the law, we have no hesitation in instructing you that as its requisitions have not been complied with, the judgment of Wilson had ceased to be a lien on the property in question before 1805. The consequence is, that the incumbrance on the property having been removed by the operation of the act of 1798, the purchaser under Hurst must hold it under his conveyance; for a scire facias issued after the five years could not restore the lien so as to affect a purchaser, though it would keep it alive as to the defendant, who does not come within the words or policy of the law. This objection to the plaintiff's recovery is therefore fatal, and would render it unnecessary to consider the remaining ones for the purposes of this case; but as they would be equally decisive if they can be sustained, as they are of great importance, and have been fully argued, we feel it our duty to express an opinion on one. It must arise in this court on future sales of real estate, on which there is an incumbrance older than the one under which it is sold; every consideration calls for its speedy decision, it arises directly in this case, and is as vital a question as those already disposed of. Had it been first considered and decided against the plaintiff, the others would have been as unnecessary for this cause, as this may be now; but the order in which the court take up the various questions in a cause does not make their opinion on the last more extra judicial than the first, where they all arise in the cause, and could not be evaded if they were presented singly, they ought to be decided.

The third objection to the plaintiff's recovery is, that the sale by the sheriff in 1815, on the judgment of *Tompkins v. Henphill* in

for more than five years, would keep alive the lien by an entry of continuances on the record, 13 Serg. & Rawle 149. In *Vitry v. Vitry*, 3 Rawle 12, the analogy between the statute of Westminster, and the act of 1798 is repudiated, one conclusive reason for which is given by the chief justice; in the former case, the statute gives the scire facias in order to enable the plaintiff to take out execution, whereas the act of 1798 declares the object of the scire facias to be to continue the lien for another term of five years. The doctrine of *Smith v. Lewis* was also repudiated in that case, and most conclusively so in *Brown v. Campbell*, in which it was held, that an execution levied, preserves the lien only on the land levied on, unless a scire facias is taken out within five years, and that the practice of perpetuating the lien by an execution levied on any thing but the land itself, has never received the sanction of judicial decision. 1 Watts 42; S. P., *Ibid.* 381; 1 Penns. Rep. 276, 279; 3 Penns. Rep. 444, 445. These cases are also decisive of the fourth question made by the defendants in this case, and in favour of the objection to the plaintiff's title, on the ground that no levy was made on the property in question before 1823.

[Thompson v. Phillips.]

the court of common pleas, operated as a discharge of this property from all prior incumbrances ; and that, by the sheriff's deed, Newman held an unincumbered title, admitting that the judgment of Wilson v. Hurst was till then an existing lien. This objection presents a question wholly new in this court, arising under the fourth section of the act of 1705, on which an indefinite number of titles depend, yet for more than a century after its passage it remained unsettled ; though often discussed at the bar and on the bench, the supreme court of the state have repeatedly and expressly declared it open. *Keen v. Swaine*, 3 Yeates 562, 564 ; *Patterson v. Sample*, 4 Yeates 316 ; *Young v. Taylor*, 2 Binn. 231 ; and so it remained till 1826.

♦ If the effect of a sheriff's sale under a younger judgment depended on general principles, we should be bound by the opinion of the supreme court of the United States in *Scott v. Rankin*. The plaintiff claimed real estate on a sheriff's sale to himself under the older judgment due to himself ; the defendant claimed under a prior sheriff's sale to himself, under a younger judgment due to him. The court declared it as an "universal principle, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien is intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into effect has never been considered as such an act. In the case at bar the judgment is notice to the purchaser of the prior lien, and there is no act of the legislature to protect the purchaser from that lien." 12 Wheat. 177. The second sale under the elder judgment was held to pass the title. This decision is authoritative on this court, and settles the general principle, that the prior lien is entitled to prior satisfaction ; the only question which would remain is, whether the legislature have protected the purchaser under the younger lien against the operation of this principle. After providing for the sale on execution of lands, the rents and profits whereof would not pay the debt in seven years, and the delivery to the plaintiff on a liberari facias of lands which would so pay the debt, to be so held by him as of his free tenement till his debt was paid, the fourth section declares the effect of both a sale and an extent : "All which said lands, tenements, hereditaments and premises, so as aforesaid to be sold or delivered by the sheriff or officer aforesaid, with all their appurtenances, shall or may be quietly and peaceably held and enjoyed by

[Thompson v. Phillips.]

the person or persons, or bodies politic, to whom the same shall be sold or delivered, and by his and their heirs, successors and assigns, as fully and amply, and for such estate and estates, and under such rents and services as he or they for whose debt or duty the same shall be so sold or delivered, might, could or ought to do at and before the taking thereof in execution." 1 Smith 59.

A previous act passed in 1700, had provided for the sale of lands on execution and appraisement, after which it declares, "such lands shall be and remain a free and clear estate to the purchaser or creditor, to whom they are so made over or sold, his heirs and assigns for ever, as fully and amply as ever they were to the debtor." 1 Smith 7.

In the sixth section of the act of 1705, after providing for the sale of mortgaged lands on a *levari facias*, or their delivery to the mortgagee for the want of buyers, the effect of such proceeding is declared to be, "and when the said lands and hereditaments shall be so sold or delivered as aforesaid, the person or persons to whom they shall be so sold or delivered, shall and may hold and enjoy the same with their appurtenances, for such estate or estates as they were sold or delivered, clearly discharged or freed from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagors, their heirs and assigns, and such sales shall be available in law and the respective vendees, mortgagees or creditors, their heirs and assigns, shall hold and enjoy the same, freed and discharged as aforesaid." 1 Smith 60.

In the eighth section is a proviso, "that no sale or delivery which shall be made by virtue of this act, shall be extended to create any further term or estate to the vendees, mortgagees or creditors, than the lands or hereditaments so sold or delivered shall appear to be mortgaged for by the said respective mortgages or defeasible deeds." 1 Smith 61.

In giving a construction to the fourth section of the act of 1705, we cannot pass over the striking difference, between the effect of a sale or delivery of lands under that, and the act of 1700; the latter says it shall be and remain, "a free and clear estate," "as fully and amply as ever they were to the debtor," which of course removes all incumbrances done or suffered by him. Had it been intended that the same effect should be given to a sale or delivery under the act of 1705, the same words would have been used, whereas the words "free and clear estate" are omitted, and the words "as fully and amply as ever they were to the debtor," are carefully supplied by

[Thompson v. Phillips.]

"as fully and amply and for such estate and estates and under such rents and services, as the debtor might or could do, at or before the taking them in execution." It would be carrying construction to an unwarrantable extent, to hold these two provisions to have the same meaning; but if we could do this, it would be in direct contradiction to other parts of the act of 1705.

The second section directs, that in case the rents and profits will pay the debt in seven years, "the lands shall be delivered on an extent," in the same manner and method as lands are delivered upon elegits in England."

Now the settled rule in England was then, and is now, that if a creditor by statute, recognisance, or judgment, takes the land of a debtor by elegit, a creditor by an elder incumbrance may levy on the moiety of the same lands, and hold it by his elegit, Yelv. 12; Cro. Eliz. 797; Noy. 47; 1 Gold. 38; 3 Leon. 239; 4 Leon. 10; Co. Litt. 289, *b*; Law of Ex. 184, 186; Gilb. L. of Ex. 55. The reason for which is, that the first judgment binds the moiety of the land, and the second can extend only the fourth part; therefore if the last judgment extends the moiety of the whole, the first judgment shall extend from him the half, because a moiety by the statute, is to be attendant to satisfy the first judgment. Gilb. on Ex. 55. Where an execution is levied on goods, the rule is different, because the judgment binding only from the delivery of the fieri facias, the first which comes to the hands of the sheriff, is entitled to prior satisfaction. By applying the English rule as to elegits, instead of the fieri facias, the legislature have conclusively declared, that an extent on a younger judgment, shall not postpone the elder judgment, but that the lands may be taken from the younger creditor.

The words in the fourth section, "to hold to him as his free tenement for the satisfaction of his debt," &c., are taken from the writ of elegit, F. N. B. 588, they are used because a remedy by assise is given in case of eviction, still the tenant by elegit has no freehold but only a chattel interest, which devolves on his executors. 3 Co. Inst. 396; 2 Saund. 68, note. These words cannot therefore give to the younger creditor any right to hold the land on an extent against the prior creditor, while his judgment is unpaid; and as the law applies equally to lands *sold* on a *venditioni exponas* or *delivered* on a *liberari facias*, the conclusion is inevitable. That as the right of the prior judgment is not affected by a *delivery* on a younger one, it cannot be impaired by a *sale* under the younger; the words of the

[Thompson v. Phillips.]

law admit of no distinction, "all land so as aforesaid to be *sold* or *delivered*," shall be held and enjoyed by the person, "to whom the same shall be sold and delivered." Nor does it admit of the construction, that creditors who receive possession under a *liberari*, shall hold and enjoy the land against a prior judgment creditor, as it would be contrary to the law of *elegit* in England, adopted expressly in the second section. It necessarily follows, that as the purchaser from the sheriff is on the same footing, he must hold subject to prior judgments. The creditor who holds the lands till the debt is paid, or the one who purchases, takes it as the debtor held it (and to remove all doubt the law defines the time), *at or before the taking thereof in execution*; not before judgments had been rendered against him. Taking also the second and fourth sections of the law, in connection with the sixth, which defines the effect of the sale or delivery of mortgaged lands, the meaning of the fourth is still plainer; the land shall be held and enjoyed "freed from all equity of redemption and *all incumbrances made or suffered by the mortgagor, his heirs and assigns*. If it was intended that the same effect should be given to a sale, or delivery on execution on a judgment, it would have been so declared; or if it had been intended that the same effect should be given to a sale and delivery on process on a mortgage, as on a judgment, the same words would have been applied to the former, either by repeating them, or a reference to the fourth section. Hence, we are clearly of opinion, that a sheriff's sale under a judgment, pursuant to the fourth section, has no greater effect than to pass the estate as the debtor held it, when taken in execution, and can no more extinguish or impair the lien of an older judgment, than a deed from the debtor. When the legislature intended to discharge the land from incumbrances, they did so in express terms, the two sections are parts of the same law and same system, providing different modes of selling lands on a judgment or a mortgage; it was their peculiar province to define the effect of the respective modes of sale and delivery, on the incumbrances existing at the time. In our opinion, it would be judicial legislation for us to so construe the law, as to confound distinctions plainly made. It is not for us to inquire into their reasons, or the sound policy of the one or the other mode; the law has defined the effect of both modes of proceedings too plainly to be mistaken. We can perceive neither in the words, or manifest intention of the law, any thing to exclude from this case, the "universal principle laid down by the supreme court, in *Scott v. Rankin*,

[Thompson v. Phillips.]

that the prior lien is entitled to prior satisfaction, nor any thing in the law, by which the purchaser under a younger lien can be protected from its application.

But if we are wrong in this view of the case, and the true meaning of the law is, to give to both modes of proceeding the same effect, the case of the defendant requires us to go much further. A sale under a mortgage discharges the land, only "from incumbrances made or suffered by the *mortgagor*, his heirs and assigns," leaving it subject to incumbrances upon it, when it came to his hands, if a sale under a judgment has no greater effect, the defendant cannot make out his case.

The plaintiff claims by a sale, under a judgment against Charles Hurst, before he had made any conveyance, the defendant claims under a sale made on a judgment against Hemphill; he must therefore establish the proposition, that such a sale discharged the land from all incumbrances upon it, made or suffered by any former owner. This will require the fourth section to be stretched, not only so as to cover the sixth, to carry it not only to the full extent of the act of 1700, by giving the purchaser "a free and clear estate" in the lands "as fully and amply as ever they were to the debtor, but further yet, to give "a free and clear estate, as fully and amply," as any former owner had held it, before any incumbrance whatever existed.

It would be deemed a bold construction of the sixth section, to hold a sale under a mortgage to be a discharge of incumbrances made or suffered by any person who had owned the land before the mortgagor; it would be overlooking entirely the definition of the effect given by the legislature, and substituting one made by the judiciary in opposition to it. And if the point were new, it would be a still bolder assumption, in carrying the effect of a sale under the fourth section, so far beyond either the sixth section of the act of 1705, and even beyond that of 1700. The proposition is a startling one, as a matter of construction on the whole system of state jurisprudence, in relation to selling land for debts. By an act of assembly passed in 1705, the orphan's court was authorized to sell the lands of an intestate for the payment of his debts, maintenance and education of children, but it did not define the effect of such sale, 1 Dall. L., App. 44, 45.

In 1794 another law was passed, declaring, "that no lands so sold shall be liable in the hands of the purchaser for the debts of the

[Thompson v. Phillips.]

intestate;" 3 Dall. L. 530; this is much more explicit, than the fourth section of the act under consideration, but it certainly cannot be held to discharge the land from any debts, other than those due by the intestate. In the case of *Moliere v. Noe*, it was strenuously contended that it did not extend to judgments against the intestate; in deciding that the purchaser held the lands discharged from such judgments, the supreme court of this state did not intimate the doctrine that the land was not still bound by incumbrances suffered by former owners, or construe the act of 1794 to extend to a mortgage given by the intestate himself. On the contrary, they declared a mortgage to be on a different footing from a judgment, and that the orphan's court had no power to sell a greater estate, than the mortgagor was possessed of. 4 Dall. 450, 454. This court would not be the first to declare, that a sheriff's sale under the act of 1705, would discharge the land from incumbrances prior to the judgment on which it was sold, when a sale under the act of 1794 would not discharge it from the lien of a mortgage given by the intestate. We could not construe the deed of the defendant in the judgment, conveying the estate in the words of the fourth section of the act of 1705, as a covenant to pay existing incumbrances; the purchaser would buy at his risk; a covenant in the words of the sixth to pay "incumbrances made or suffered by the mortgagor," would not extend to judgments against a former owner, nor would a covenant to pay "the debts of an intestate," in the words of the act of 1794, create any obligation to pay any debt, not of the intestate, though it was a charge upon the land in his hands.

We cannot give to a sheriff's deed, made in pursuance of a law defining its effect, any greater efficacy, than the deed of the debtor, made with covenants in the words of the law. If then the question presented by this objection remains to be decided by our opinion of the act of assembly, or the principles settled by the supreme court of the United States, we should not hesitate in declaring, that the sale under the judgment against Hemphill, did not impair the plaintiff's right of recovery.

If land after being sold by order of an orphan's court remains charged in the hands of a purchaser, with a mortgage given by the intestate; a fortiori, land sold by the sheriff remains charged with all incumbrances, prior to the judgment on which it was sold, and so we should feel it our duty to instruct you, if we are governed by

[Thompson v. Phillips.]

the acts of assembly, the case of *Scott v. Rankin* decided in 1827, or *Moliere v. Noe* decided in 1806.

But we find that the supreme court of this state in 1826 gave a different construction to the act of 1705, in the Commonwealth for use of *Gurney v. Alexander*, 14 Serg. & Rawle 257, &c.; in that case they decided that a sheriff's sale discharged the land from all prior judgments against the defendant, as whose property it was sold, and any other person from whom it came to him. In *Barnet v. Washebaugh*, they applied the same rule as to a legacy charged upon the land, 16 Serg. & Rawle 410; in *Willard v. Norris*, they held that a sale on a judgment discharged the land from a prior mortgage, 2 Rawle 56. In *M'Lenagon v. Wyant*, the court declare the same rule to be applicable to all judicial sales, whether by an order of orphan's court, or by a sheriff; and that they divest all liens whether general or specific, 1 Penns. Rep. 112, 113. Such has been the course of adjudication in the court of the last resort in the state for the last four years, in direct affirmance of the doctrine contended for by the defendant's counsel; it is now a rule of property and title, and as a settled construction of a state law, it is deemed to be a part of the law itself, and (generally speaking) as much a rule of decision in the federal courts under the thirty-fourth section of the judiciary act, as the text of which it is the judicial exposition. 11 Wheat. 367. The extinguishment of a prior lien is not impairing the obligation of a contract, for none exists between the prior creditor, the sheriff, or his vendee; the effect of the law so construed divests a vested right, but unless this right is founded on a contract, it is not obnoxious to any prohibition in the constitution of the United States. 2 Peters 412.

Those are the settled principles of the supreme court of the United States, to which we must conform; they will yield their own construction of the statutes of a state to that of the state courts previously made, respect their local common law and usage, and administer the jurisprudence of the states as their own courts do; 1 Peters 359, 360; 3 Dall. 344; 5 Cranch 22, 32; 9 Cranch 87; 1 Wheat. 379; 2 Wheat. 316; 6 Wheat. 119; 10 Wheat. 152; 11 Wheat. 361; 12 Wheat. 153; 2 Peters 505, 556; 3 Peters 85; 4 Peters 468, 392. They will hold a case under advisement after argument, when it turns on a point of local law depending in a state court; and, though they will hold it not to be conclusive authority, will pay great respect to it; 2 Peters 520, 521; so where

[Thompson v. Phillips.]

there had been an uniform course of professional opinion and practice. 2 Peters 85. The same rule will not be applicable to a single decision of a state court, where the supreme court of the United States had previously decided otherwise ; 11 Wheat. 367, 369 ; but we do not feel at liberty to make the exception in this case, especially as the legislature at their last session, with full knowledge of this course of decisions, have not made any change of the law as to the lien of judgments, though they have done it as to mortgages on land sold under a younger judgment. Though this is not a legislative construction of the fourth section of the act of 1705, yet it is an implied sanction of its judicial exposition.

As the case of Rankin v. Scott was directly in favour of our construction of the law of the state, prior to Gurney v. Alexander, and was decided only eight months afterwards, and first promulgated, it was not without some difficulty that we came to the conclusion, that though it was the decision of a court by whom our judgments can be revised we could not apply it to this case. An anxiety to administer the law of the state in this court, by the same rules which prevail in the highest judicial tribunal of the state ; to be governed by the most liberal principles of comity and respect, which the supreme court of the United States have adopted in relation to state adjudication, and to give the most free construction to the thirty-fourth section which it can authorize, has induced us to this course. It is necessary to create confidence and preserve harmony between the courts, which, organised under different governments, administer the same laws ; and this court ought never, unless in a very clear case, to decide in opposition to state laws or judicial decisions. Cases of doubt and difficulty should be referred to the supreme judicial tribunal of the union.

Had the case of Scott v. Rankin been first decided (or arisen under the act of 1705) we should have followed it, though subsequent decisions of the state court had been different ; the case of Huidekoper v. Douglass has been uniformly adhered to in this court, though it turned on the construction of a land law of this state, which the supreme court of the state have ever since construed differently. Vide 3 Cranch 1, &c. But as the decision in Gurney v. Alexander was first given, is decisive of the question, and has since been followed in all the courts of the state, we felt it our duty to instruct you, that the sale under the judgment against Hemphill gave the defendant a title to the premises in question, unincumbered by the

[Thompson v. Phillips.]

judgment of Wilson. It is satisfactory to us to know that the cause is in a train for the correction of any error we may have committed.

For reasons applicable to one of the judges, no opinion will be given on the fourth question made in the cause. Though we have referred to the act of 1705 in relation to mortgages, by way of illustration, we must be distinctly understood as expressing no opinion on the effect of a sale under a judgment, on a prior mortgage.

The defendant, in our opinion, is entitled to your verdict.

SCOTT v. BLAINE.

A final decree rendered against two defendants jointly, will not be set aside on motion, on account of the death of one of the defendants before the hearing. After the term in which a final decree has been rendered, it cannot be reversed, annulled or set aside, except by appeal or bill of review.

THE bill was filed against Blaine, Irwin and Carothers, in October 1824, Carothers died before answer, his death was averred in the answer of Irwin, the answer of Blaine and Irwin was filed in September 1825, Blaine died some time before October 1828, but no suggestion of his death was entered on the record, or any notice taken of it. The case came on for a hearing in May 1829, when a decree was rendered jointly against Blaine and Irwin, that they pay to certain persons therein named the sum of 5000 dollars.

Mr Kittera moved to set aside the decree against both, on the ground that, being joint, it was void by the death of Blaine, before the term antecedent to that in which the decree was rendered, or the cause ordered for a hearing.

The utmost extent to which a court of equity goes, is to order the decree to have relation back to the time of the argument, where one of the defendants dies between the hearing and the decree, as in 4 Johns. Ch. 342, or where the cause has stood some time for judgment and a defendant dies in the interval, and the suit not revived when set down for judgment, as in 9 Ves. 461, or where a defendant dies after hearing and before judgment. 2 Madd. Ch. 529, cited.

In a court of law, the remedy would be by writ of error coram vobis, but in equity it is only on motion to set aside the decree.

Messrs Joseph R. Ingersoll and Chauncey opposed the motion, on the ground that the obligation on which suit was brought, and the answer being joint, the suit did not abate, as a decree could be rendered against the survivor, who ought to have suggested or pleaded the death of the other defendant.

In a court of law, the death of one joint plaintiff before judgment was allowed to be suggested on the roll, and execution to go in favour of the survivor, Newcommon v. Lee, 5 Durnf. & East 577, so

[*Scott v. Blaine.*]

where judgment was entered against two defendants, and execution against the survivor, the court, on a writ of error coram vobis, allowed the record to be amended, by suggesting the death of one on the record, *Hamilton v. Holcombe*, 1 Johns. Cas. 29; *Desmond v. Carpenter*, S. P., 2 Johns. Rep. 184; *Hill v. West*, 1 Binn. 486.

In equity a suit abates by the death of a party only who is necessary for a decree. 1 Harr. Ch. 120, 126, 153; Mitf. 53; Coop. 62; *Brown v. Higdon*, 1 Atk. 291.

By the Court.—The decree in this case is final, it was rendered on hearing and argument more than two terms since, on an issue regularly made up. It is therefore too late to annul it on motion, we might correct any clerical errors, miscasting or inaccuracies, but cannot declare it void on account of any thing now suggested.

It is among the earliest rules of chancery, which have been in force from the time of lord Bacon, that no decree after enrolment can be reversed, annulled or set aside, but on a bill of review for error apparent, or some new matter not known at the time of the decree.

However erroneous, therefore, this decree may be in law or fact, it must stand till reversed on appeal, or by bill of review. It is not necessary to decide on what may be done on petition, cross bill, or otherwise, in order to prevent injustice being done to the surviving defendant; or what would be the proper course to pursue, on an application by the legal representative of the deceased defendant, or of the complainant. A court of equity is competent to model its process for enforcing a decree, according to justice and good conscience, but after the term in which it is rendered, cannot annul it on motion. The motion is therefore overruled.

Circuit Court of the United States.

PENNSYLVANIA, APRIL TERM 1831.

BEFORE

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

CASTER V. WOOD.

Where a defendant had answered generally to a matter, of which he had no particular knowledge, he was allowed to file a supplemental answer on the same subject, after he had acquired particular information concerning it. He may introduce into such answer, new matter which has come to his knowledge since filing the original answer on furnishing the opposite party with the names of the witnesses by whom he expects to prove it.

Applications to amend an answer are in the discretion of the court.

THE defendant had filed his answer on the 19th of March 1831; on the 21st of April, Mr Brashears moved for leave to file an additional answer, as an amendment to the one filed.

This motion was founded on an affidavit of the defendant, stating that at the time of filing his answer, he had only a general knowledge of the facts referred to in the first part of the amended answer now offered; that from ignorance of the particulars, he was obliged to answer generally, and he did not obtain possession of the papers and documents, which were necessary to give him information, which would enable him to answer with any particularity till the 19th of April; that at the time of filing his answer, he was entirely

[Caster v. Wood.]

ignorant that Edward Livingston had filed a bill in the equity side of the circuit court of the district of New York, against the complainant in this case, concerning the title to the lands embraced in the contract between him and the defendant, which is the subject matter of the present suit. But that such bill has been filed by said Livingston, the knowledge of which did not come to defendant till about the 1st of April, and that the said bill is referred to and annexed to the amended answer now offered.

In support of the motion, Messrs Brashears and Sergeant referred to 2 Madd. Ch. 375, 376, and 4 Madd. Rep. 21, 27, for the general principles on which answers are permitted to be amended.

Mr Budd and Mr Binney opposed the motion, on the authority of the cases in 10 Ves. 401 ; 2 Mer. 57 ; and 2 Ves. & Beame 256.

BY THE COURT.—Applications to amend an answer are not grantable of course, but depend on the discretion of the court, they are viewed more favourably when made to reform an answer, than when made to take it off the file and substitute a different one ; the former is allowed in many cases, the latter only in special cases, where the conscience of the court is satisfied that the purposes of justice require it. 4 Madd. Rep. 28 ; 4 J. C. 375, 376.

As a general rule, the plaintiff is entitled to the benefit of all the admissions of the defendant on oath, and it must be a clear case where the answer will be permitted to be taken from the file. But the present motion is merely to amend and explain matter not fully stated in the answer, on account of the partial information then possessed by the defendant, and the introduction of new matter since come to his knowledge, deemed material to the case. We think it comes within the established rules of courts of equity, and therefore allow the amendment, imposing on the defendant the condition of furnishing the opposite party with the names of the witnesses whose depositions he intends to take.

PARKER v. NIXON.

A party taking out a commission to take evidence in relation to pedigree, is not bound to name the witnesses he intends to examine.

IN this case a rule had been entered for a commission to take testimony in England, on which the party obtaining it, was called on to name the witnesses he intended to examine: after an argument, the court decided:

That it was not a matter of course, to compel the party to name the witnesses to be examined on a commission, but depended on the discretion of the court, to be exercised on the circumstances of the case. This being a case of pedigree the commission ought to issue without naming them.

[United States v. Hinman.]

been drawn there. It is therefore a proper case for the jury to decide on a comparison of the order with the indictment, whether the place and the names are the same. There is no rule of law that the omission to cross a *t* or dot an *i* makes words different from their obvious intendment, the shape of the marks denoting a letter, whether it is an *o* or an *a*, is a matter of fact and intention. We cannot judicially say that because the district attorney did not draw a line across the letter *l* the indictment cannot in law mean Fayetteville; or because, in referring to the name of the president of the bank, he wrote *Jna*, instead of *Jno*.; it is not for us to measure the lines and curves of a letter, to ascertain whether it is an *a*, an *o* or any other letter. If they may be reasonably taken to mean either, the jury are at liberty to adopt such as seems to them to comport with the obvious intention of the writer; and they ought to have evidence that there is a bank at Fayetteville, of which some other person than John Hulse is president, before they can decide, that the place where the order was drawn, and the person drawing it, are not as laid in the indictment.

The indictment follows the words of the law, defining the offence to be, "or shall pass any false, forged or counterfeited order or check upon the said bank or corporation, or any cashier thereof." The corporation is created by law, by the name and style of "the President, Directors and Company of the Bank of the United States;" § Story 1550; the cashier of the bank is the cashier of the corporation, and an order or check drawn on him is drawn on the corporation or a cashier thereof. We are therefore of opinion that the indictment is well drawn, 12 Wheat. 474; and that the order ought to be received in evidence.

The admission of the bundle of notes found on Moore depends on the fact of a concert and communication between him and the defendant in passing counterfeit notes or orders; if they had made a common or concerted cause, in which each had his part to act, or they in any way acted together in pursuance of any agreement or understanding, each is answerable for the acts of the other, as fully as if done by himself. The whole conduct, acts and declarations of the one, accompanied with acts, are evidence against the other. It is not for us to decide how, for the connection between Moore and Hinman is proved; but as there has been enough of evidence given of concert and joint action as conduces to prove the fact, a *prima facie* case is so far made out as to make it proper to submit it to the jury.

[United States v. Hinman.]

If they are satisfied that there was a concert or action for the effecting the common object of passing the counterfeit orders, their possession by Moore is in law the possession of Hinman ; 12 Wheat. 468, 470 ; and they may infer the scienter as if they had been found on him.

Verdict, Guilty.

Circuit Court of the United States.**PENNSYLVANIA, APRIL TERM 1831.****BEFORE**

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

WOODHULL AND DAVIS V. WAGNER.

A discharge of a debtor under the insolvent law of Pennsylvania, does not protect him from arrest by a citizen of New York, for a debt payable in New York, or to a citizen of that state.

Insolvent laws of a state have no effect beyond the limits thereof.

A residing in Philadelphia, consigned goods to B residing in New York, and drew his bill on B, promising to pay the balance which might be due after the sale of the goods, if the proceeds did not reimburse B the amount of the bill. B accepted and paid the bill which exceeded the amount of sales: Held, that A was bound to reimburse B at New York.

The decisions of the supreme court on state insolvent laws collected and classed.

THIS was an application to discharge the defendant from custody under a *capias ad satisfaciendum*, and was submitted to the court upon a statement of the facts, as follows:

William Wagner, residing in Philadelphia, drew a bill upon Woodhull & Davis, residing in New York. It was accepted and paid at maturity by the acceptors. The late firm of Snowden & Wagner had consigned to Woodhull & Davis a cargo of turpentine, which was not disposed of at the time of accepting the bill, at which time the firm was dissolved, and the defendant was carrying on business

[Woodhull and Davis v. Wagner.]

alone. After winding up the sales and crediting the net proceeds, a balance remained due on Wagner's bill, upon the New York house. Suit was brought against William Wagner for not indemnifying Woodhull & Davis for their acceptance on his account. The defendant being in custody on a ca. ad sa., applied for his release, on the ground of his discharge by the insolvent laws of Pennsylvania. This was opposed on the allegation, that the debt was contracted in New York, and therefore not affected by this discharge here.

The opinion of the Court was delivered by BALDWIN, J.

The statement of the case agreed on by the parties, presents only one question for the consideration of the court, which is, whether the defendant's discharge under the insolvent laws of Pennsylvania, entitles him to be discharged from the arrest made under a capias ad satisfaciendum, issued from this court in execution of a judgment obtained against him eleven months before his discharge.

The power of the states of this union to pass bankrupt or insolvent laws, and the effect of the exemption of the person of the debtor, or property acquired after the discharge, have been the subject of much discussion and difference of opinion.

In the supreme court, they have been so fully examined by counsel and the judges, as to make it necessary only to state the result of such cases as bear upon the present application.

In *Sturges v. Crowninshield*, 4 Wheat. 122, 91, it was decided; 1st. That a state had a right to pass a bankrupt law, provided there was no act of congress in force establishing a uniform system of bankruptcy, conflicting with such state law; and provided it did not impair the obligation of a contract, within the tenth section of the first article of the constitution; 2d. That such state law, liberating the person of the debtor, and discharging him from liability on contracts made previously to the law, was unconstitutional and void, so far as it discharged the contract, or attempted to do so; but, 3d. That it was valid so far as it discharged the person of the debtor from confinement, as imprisonment was merely a remedy to enforce the obligation of the contract, but no part of the contract itself, a release from it did not impair the obligation. 4 Wheat. 200, 201. Though the court, in the latter part of their opinion, 4 Wheat. 207, confine it to the second point, yet the first and third having been considered, and their judgment exercised on them, it has always been understood (and so we feel it our duty to view it), that the law is settled on these points, according to the reasoning of the

[Woodhull and Davis v. Wagner.]

court, if not their direct decision. The same principle on the third point was affirmed in *Mason v. Haile*, 12 Wheat. 370, which was decided independently of any considerations arising from the locality of the contract or the parties. In that case the court declared, that a state law abolishing imprisonment for debt, would be valid as a measure regulated by the state legislature, acting on the remedy, and that in part only, and repeat the doctrine asserted in *Sturges v. Crowninshield*, 4 Wheat. 378.

In *M'Millan v. M'Neill*, 4 Wheat. 209, the court are said to have declared that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle; and in the *Farmers Bank v. Smith*, 6 Wheat. 131, they decided that the fact of both parties being citizens of Pennsylvania when the contract was made, made no difference between that and former cases.

From the opinion of all the judges in *Saunders v. Ogden*, 12 Wheat. 213, 333, it seems that the point decided in *M'Millan v. M'Neill*, was not correctly stated in the report, and that it was not intended to settle the question of the effect of the law upon contracts made subsequent to its passage. The question remained open till the case of *Saunders v. Ogden*, in which four of the judges gave their opinions that the contract could be discharged by a state law passed before the contract was made; putting the case on the distinction between bankrupt or insolvent laws which were retrospective, and those which were prospective in their operation. But these opinions led to no final judgment on this point, which in strictness may therefore be considered as not having been adjudicated, though it was the deliberate opinion of a majority of the court; but this point does not arise here, and it is therefore not necessary to the decision of this motion to notice it further.

Another point of more immediate application arose in that case. The suit was brought on a bill drawn by Jordon in Kentucky, on Ogden, a citizen of New York, resident there, and accepted by him in favour of Saunders, a citizen of Kentucky. One of the judges who composed the majority on the first question, being of opinion that a discharge under the law of New York, was void as to a citizen of Kentucky, four judges concurred in giving judgment for the plaintiff, on the ground of the invalidity of the law. 12 Wheat. 369. Judge Johnson was the only judge who gave an opinion on the second point, the three who concurred with him on the first dissented on this, the three who dissented on the first assented to

[Woodhull and Davis v. Wagner.]

the judgment which was entered for the defendant in error, but without assigning any reasons beyond those given in their dissenting opinion on the first question.

If the case of *Ogden v. Saunders* had turned upon the mere point of citizenship of the plaintiff, it would be difficult to say what was the direct judgment of the court. Three judges thought the law of New York was valid, having been passed before the debt was contracted, and that it operated on the case, the contract having been made and to be executed there. Three gave no opinion on the locality; it was not necessary to do so, as they thought the plaintiff entitled to judgment on the first point. Thus considered, this case, standing by itself, directly adjudicates no definite question involved in the one now under hearing, as we are not informed whether the three judges who concurred with Judge Johnson in rendering judgment against the party claiming under the law, did it for the reasons assigned by them in their dissenting opinion on the first point, or those assigned by him on the second. No question arises here as to the right of the plaintiff to all remedies against the defendant's property. The law under which he has been discharged is not unconstitutional, as it attempts to discharge only the person. The only doubts are: 1. as to the effect of a discharge on a debt contracted in New York; 2. with a citizen of that state; 3. on process issued from this court.

All the judges, in *Ogden v. Saunders*, stated that the point decided in *M'Millan v. M'Neil* was, that a discharge of the defendant under a law of Louisiana, could not discharge or operate on a contract made and to be executed in South Carolina, where both parties then resided. Thus affirming individually, if not in their collective judgment, the principle then settled. In several cases preceding that of *M'Millan v. M'Neill*, as well as in that, the supreme court have declared that the discharge by the bankrupt laws of a foreign country was no bar to an action brought on a contract made in this. 4 Wheat. 213; 2 Cranch 298, 302, *Robertson's Administrators v. The Bank of Georgetown*, January term 1831; 12 Wheat. 358, et seq.

In *Buckner v. Findley*, 2 Peters 586, the court declared that "for all national purposes embraced by the federal constitution, the states and the citizens thereof are all united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to and independent of each other;

[Woolhull and Davis v. Wagner.]

their constitution and forms of government being, although republican, altogether different, as are their laws and institutions." Ibid. 590.

This principle appears to be directly applicable to the laws of the states, discharging the persons and future acquisitions of debtors.

Such laws are wholly unconnected with the federal relations of the states to the general government, where they do not impair the obligation of contracts. Discharges under them are, in other states, to be considered as made under foreign laws, within the uniform decision of the supreme court, having no extra-territorial effect on contracts made beyond their jurisdiction, or with persons not subject to their laws at the time when it was to be carried into effect. In this light, and taken in connexion with these cases, the case of *Ogden v. Saunders* is important, as showing the concurrence of all the judges in the general principle as to the effect of discharges under foreign bankrupt laws. It is also important as connected with the case of *Shaw v. Robins*, in a note to 12 Wheat. 369, in which the court decided, that a bill of exchange, drawn by a citizen of Massachusetts on a citizen of New York, and accepted by him, being a resident there, could be recovered in a state court, though the defendant had been discharged under the insolvent laws of New York.

The facts of the case were those of *Ogden v. Saunders*, the decision in which was held applicable, and governed the one before them. Thus connected with the preceding case of *M'Millan v. M'Neill*, and the subsequent one of *Shaw v. Robins*, the case of *Ogden v. Saunders* must be considered, at least in the circuit court, as settling both principles; that a discharge by the law of a state operates only on contracts made between its own citizens, and to be executed within the state. The opinion of Judge Johnson may then be taken by us as that of a majority of the court on the effect of their decision of that case in pages 368, 369.

He declares it to be an adjudication in that case, "that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts."

The learned judge maintains these propositions: 1. "That the power given to the United States to pass insolvent laws is not exclusive." 2. "That the fair and ordinary exercise of that power by the states, does not necessarily involve a violation of the obligation of contracts, *a multo fortiori*, of posterior contracts." 3. But when

[Woodhull and Davis v. Wagner.]

states pass beyond their own limits, and the rights of their own citizens, and act on the rights of citizens of other states, the exercise of such a power is incompatible with the rights of other states, and the constitution of the United States. (In 6 Peters 643, this point was declared to be finally and conclusively settled.)

In the next case which came before the supreme court on the effect of discharges by state bankrupt laws, *Clay v. Smith*, 3 Peters 411, the plaintiff was a citizen of Kentucky, the defendant of Louisiana, who was discharged, "as well his person as his future effects, from all claims of his creditors," by a law of that state passed in 1811. The debt sued for was incurred in 1808. The plaintiff made himself a party to the proceedings under the law, and was thereby held to have abandoned his extra territorial immunity from the operation of the bankrupt law of Louisiana, which released the defendant from all demands on his person, or subsequently acquired property.

The result then of what we must consider in this court as the decision in the foregoing cases is, that a state law discharging the person of a debtor from arrest for debts contracted in the state between its own citizens as affecting only the remedy to enforce, not the obligation of the contract, is valid, and not within the prohibition of the constitution, whether the debt was contracted before or after the law. *Sturges v. Crowninshield*; *Ogden v. Saunders*; *Mason v. Haile*. So is a law discharging both the persons and future acquisitions of the debtor from contracts posterior to the law; or from anterior ones, if the creditor makes himself a party to the proceedings which lead to the discharge in the state court. *Ogden v. Saunders*, *Clay v. Smith*. But such laws have no operation out of the state over contracts not made and to be carried into effect within it, or over the citizens of other states. *Harrison v. Sterry*; *M'Millan v. M'Neill*; *Ogden v. Saunders*; *Shaw v. Robins*; *Robertson's Administrators v. The Bank of Georgetown*. That it makes no difference whether the suit is brought in a state court, or the court of the United States; the rule is the same as to rendering judgment or issuing process. *Farmer's and Mechanics Bank of Pennsylvania v. Smith*; *Shaw v. Robins*; *Ogden v. Saunders*.

A state law not repugnant to the constitution, laws or treaties of the United States is, by the thirty-fourth section of the judiciary act, a rule for the decision of all cases to which it applies in the federal

[Woodhull and Davis v. Wagner.]

courts ; and we must decide on this precisely as the state courts ought to do. 2 Peters 413, 414, 656 ; (5 Peters 401.)

With these settled principles to control our decision, it only remains to apply them to the contract, on which the plaintiffs have obtained their judgment.

The defendant, residing in Philadelphia, consigned to the plaintiffs, residing in New York, a quantity of turpentine to be sold on his account. In anticipation of the sale he drew a bill on the plaintiffs, which was accepted and paid, the sales did not reimburse them, they brought their suit to recover the balance, and obtained the judgment on which the *capias ad satisfaciendum* was issued. By the nature of this contract the defendants undertook in law to pay this balance to the plaintiffs, were bound to reimburse them at the place where the money was advanced, and the plaintiffs had a right to draw for the difference between the amount of the bill so accepted and paid, and the proceeds of the sale. We can perceive no difference between this right in the plaintiffs to draw for this balance, and the obligation of the defendant to pay, which arose from the nature of the contract, and a letter expressly authorising the drafts for acceptance. The case comes within the principle settled in *Lanusse v. Barker*, 3 Wheat. 101 ; where Lanusse having advanced money in New Orleans, on the faith of letters written by Barker in New York, it was held that the money was to be replaced at New Orleans, and Barker was adjudged to pay the balance at New Orleans interest of ten per cent.

The undertaking then being to replace the money in New York, that was the place where the debt was payable ; and the plaintiffs being citizens of that state, the discharge of the defendant by the insolvent laws of Pennsylvania, can have no operation on the contract, or the remedies to enforce performance.

As the decisions of the supreme court are authoritative, we have not thought it necessary to go into detailed examination of those in the circuit courts.

They will be found in accordance with the principles settled in the supreme court on all the points arising in the case. 1 Peters 404, 484 ; 1 Wash. 340, 341 ; 3 Wash. 313 ; 4 Wash. 424, 443, 476 ; 1 Gall. 169, 375, 441 ; 3 Mason 88.

Defendant remanded to custody.

WHITNEY AND OTHERS V. EMMETT AND OTHERS.

If the deposition of a witness who is attending in court is read without objection, he may be examined in chief by the party who read his deposition.

A patented invention is deemed useful if it is not frivolous; the want of utility is good cause for not granting the patent, but not for setting it aside.

The prior knowledge and use of the invention which avoids a patent, relates to the time of the application, not the discovery, and to public use with the knowledge and privity of the patentee, not to a private or surreptitious use in fraud of the patent.

If the application is made in a reasonable time after the discovery, any intermediate knowledge or use will not affect the patent. But the invention must be new to all the world.

If the patent is for an improvement, it must be substantially new, one capable of application by the means pointed out by the patent, specification, drawing, model and the old machine.

If by these means the invention and the mode of using it, are intelligible to persons skilled in the subject, the requisites of a specification by the third section of the act of 1793 are complied with.

It is not necessary that the disclosure of the secret should be such as to enable the public to use the invention after the patent has expired, as in England, such being the consideration on which patents are granted there. The difference between their patent laws and ours explained.

If the patent is broader than the invention, if not sufficiently descriptive, taken in connection with the specification, &c., the plaintiff cannot recover. But though the patent is too broad in its general terms, it will be limited by a summary and disclaimer, if they show the thing intended to be patented, and that no claim is made to any thing before known or used.

A patent is a contract with the public in the terms of the law, which must be complied with in the same good faith as other contracts, but as it gives a right of property, it ought to be protected by a liberal construction of the law and the acts of the patentee.

A circuit court can give a judgment declaring a patent void only in the cases provided for in the sixth section. If the patent is defective for any other cause, the court can only render a general judgment for the defendant.

What is a proper subject for a patent, &c.

THIS was an action to recover damages for the violation of a patent for an improved method of making glass knobs, as described in the specification.

“To all persons to whom these presents shall come, Henry Whitney, agent of the New England Glass Company, and Enoch Robinson, mechanic, both of Cambridge in the county of Middlesex, and state of Massachusetts, send greeting :

[Whitney et al. v. Emmett et al.]

“Be it known, that we, the said Henry Whitney and Enoch Robinson, have invented, constructed, made and applied to use, a new and useful improvement in the mode of manufacturing by machinery, at one operation, glass knobs or trimmings for doors, stoves, drawers, sideboards, bureaus, wardrobes, and all kinds of furniture, and other things where glass handles, knobs or ornaments may be used and fastened by spindles running through the centre of them, specified in the words following, to wit:

“This improvement in making knobs, consists in compressing them in moulds, in the manner following. The mould is made of a composition of brass and copper, cast steel or other metal, of a size and shape suitable to contain the knob, of which mould a model and drawing is deposited in the patent office. It is in two parts, a top part and bottom part; the lower or bottom part is to receive the melted glass and form the main part of the knob, and the top part is to press the knob, form its ornamental face, and to perforate it with a pin longitudinally. The bottom part is made in two pieces, fastened together by a hinge on the backside, with handles on each side, in front, to open and shut it, and a clasp to fasten it together, while receiving the melted glass and the impression. The bottom part terminates upward by a tube, cylindrical or nearly so, from one-eighth to four-eighths of an inch high, according to the size of the article to be made, into which the top part of the mould enters to compress and form the knob and stamp its face. The top part is of a size and shape suitable to enter and fill the cylindrical space at the top of the bottom part; on its face or underside is a die, figured with circles, rings, hearts, roses, leaves, fruit, animals, or any other fancy or ornamental shape, which has been or may be used in brass or other ornaments, or the face may be made plain.

“Into the top part is fastened a steel pin, of a square, round or any other shape, projecting from it perpendicularly downward, of a length sufficient to penetrate quite through the article to be made. To reject the surplus quantity of glass and prevent its accumulation in the mould from the quantity displaced by the pin in perforating the knob, a hole nearly of the size and shape of the pin, is made perpendicularly downwards through the under part of the bottom piece of the mould, through which the surplus glass is driven by the expression in forming the article.

“To use the mould, we place the bottom part on a table, on which is perpendicularly erected a standard twelve or fourteen inches high,

[Whitney et al. v. Emmett et al.]

for the purpose of attaching to it a lever, to force down the top part and give the impression, and to hang a gate turned on a pivot, to which the top part of the mould is fixed. On the end of the lever behind the standard, a spiral or other spring is fastened, which is also fastened to the table, to suspend the top part of the mould when it is raised by the lever. The position of the top is so adjusted, with reference to the bottom part of the mould, by a guide fastened to the standard, that when the power is applied to the lever to compress the glass, the top exactly shuts into the bottom part and forces the pin through the knob into the hole below it.

“The mould being thus prepared for use, the top is raised by the lever and turned a little on one side by the gate to give room to drop the melted glass into the bottom part of the mould. The glass is then gathered from the pot and dropped into the bottom part of the mould, which is already closed and secured against opening by the clasp; the gate is then turned back against the guide, so that the top of the mould is brought directly over the bottom, and by the application of power to the lever the article is at once compressed, formed and finished; the top is then raised by the lever, the clasp on the bottom part is unfastened, the mould is opened by the handles, and the knob taken out so entirely finished, that it only requires fire polishing to make it a neat article fit for immediate use.

“We do not claim to be the original inventors of the mould, as applied to the formation of glass wares, but admit that for many purposes it has been heretofore used. Our invention consists in this, a new combination of the various parts of the mould, with the use of the pin and machinery before described, in such a manner as without any blowing to produce a finished knob with a hole perforated through it, and a neck or enlargement, so that it will not come out of the mould without opening it, at one operation, by compression merely.

“In testimony that the above is a true specification of our said improvement, as above described, we have hereunto set our hands and seals, this 22d day of August, in the year of our Lord 1826.”

A drawing and model of the improved machine were produced at the trial, as also the old machine, and the one used by the defendants, which was alleged to be the same in substance as the one patented; the fact and extent of the infringement were admitted,

[Whitney et al. v. Emmett et al.]

as well as the general utility of the improved machine, so far as was required by law.

The cause turned on the validity of the patent, which was alleged to be void, because the invention was not new, and the specification defective; much evidence was heard and read on the questions of fact, but no questions of law arose except such as were founded on the patent and specification.

Mr C. Ingersoll and Mr C. J. Ingersoll, for defendants.

The patent is void on account of the defect in the specification, in not describing what parts of plaintiff's machine are old and what parts are claimed as his invention; it is the more necessary in this case as the patent embraces the whole machine, whereas it is admitted that only parts were invented by the plaintiffs. If the improvement is not so specified as to discriminate between the original and improved machine, and the patent is taken according to its terms, it is broader than the invention, and therefore void. 1 Gall. 479, 480; 11 East 110. The law requires the specification to explain the precise improvement patented; if it is for a new combination of the old parts, the improved mode of operation and construction must be particularized; if for any new parts or additions, they must be specified, and their connection with the old parts explained. The specification is defective in both particulars; the law requires that it should set out every thing necessary to enable others to avoid any interference with the thing invented, to describe it in such clear terms that others can use it, and the public have the benefits of it after the patent right has expired, otherwise it is void, although we do not make out a case of fraudulent addition or concealment, according to the terms of the sixth section of the law.

If the specification is not strictly conformable to law, the patent is void, to whatever cause it is owing; it must speak for itself, Say 254, so as to be intelligible without extraneous explanation, for the full and perfect explanation and description of the thing patented is the consideration of the grant, for the want of which it is void. 7 Wheat. 423, 468. A perfect description is the plaintiff's only title, which he must make out affirmatively on the face of the specification, for the benefit of the public, who are parties to all suits on patents, and public policy declares them void if they do not meet every requisition of the law. Davis on Patents 55, 56.

Patents being monopolies, in derogation of common law rights,

[Whitney et al. v. Emmett et al.]

are deemed odious in the law, unless they are clearly for an invention of the patentee; if the subject matter is not new, though new to the inventor, his patent is void, or if the patent embraces any thing not new. In this case the summary, which is the outline of the patent, refers to the whole machinery, without a clue to separate the old from the new, the parts disclaimed are useless, and those claimed are a mere change of the forms and proportions of the old parts. Judging from the specification, the patent is not for an improvement on a machine, or an improved machine, but for a result which is pointed out, it is wholly obscure as to the mode of operation, and the particular combination of the old and new parts which produce this result, on this account the patent is void. But if it is valid the plaintiff cannot recover in this case, because his patent is for a combination of machinery, and he has not shown that our machine adopts his whole combination, 1 Mason 474, 475, or in what particular it is an infringement of his right.

Mr Cadwalader and Mr Sergeant, for plaintiffs.

If inventors are not protected, great injustice is done them, because they cannot be restored to their rights after they have disclosed their invention to the public by a specification, which enables any person to take advantage of it. In this case the invention is very plainly described in detail in the body of the specification, and in summing it up at the close, by declaring it to consist of a new combination of the various parts of the mould, &c., disclaiming its original invention and admitting its former use. It is not necessary to describe the old machine or its parts, which are as well known and familiar to a person who understands machinery, as a watch; a patent for an improvement on a watch is good without describing the watch, Davis 45, 56, so of a steam engine, 8 Durnf. & East 98, or an improvement in mill machinery. 3 Wheat. 511, &c. The specification is addressed to engineers and persons skilled in the business to which the improvement relates, Davis 214, 216, if they understand the invention, and can produce the result, the object of the law is answered; when others are enabled to make the improved machine from the directions given in the specification, this is the scope and end of the matter, Pl. 18, required by the law, and when this can be done the patent is good, though the description may be imperfect, if it is not designedly so to mislead the public, 1 Peters C. C. Rep. 400; 1 Gall. 479, 480, and the disclosure made in the

[Whitney et al. v. Emmett et al.]

same good faith that is required in other contracts, 14 Ves. 131, 136; 1 Durnf. & East 606. By applying the specification to the old and improved machines, and putting them into operation, the invention is at once intelligible; and the summary and disclaimer limit it to the new combination, 2 Mason 112; 8 Durnf. & East 103, so that it is as broad as the patent. By applying the same test to the defendant's machine it is apparent that the whole improvement of the plaintiffs is used; if they allege that any part of what is claimed as the invention had been known or used before our application for a patent, the burthen of proof rests on them to prove it to have been a public use, and not one in fraud of the patent, or after notice of the application. Pennock v. Dialogue, 1 Peters 4, 14. Patents give a right of property in the invention, they are construed as other grants are, liberally in favour of the grantee, and so that they shall be sustained, where there has been a substantial compliance with the law, and the subject matter is a practical improvement. 11 East 110; 2 H. Bl. 495; 1 Durnf. & East 606.

BALDWIN, J., to the jury.

The plaintiff's patent is for a new and useful improvement, in the mode of manufacturing glass knobs by machinery at one operation, by spindles running through the centre of the knob, without blowing. The specification describes the manner of doing it, and concludes with a declaration, summing up the invention and disclaiming the right to the exclusive use of the mould, as formerly used, but claiming the invention to be a combination of the parts, with the use of the pin and machinery before described.

It is admitted by the defendants that they have infringed the right of the plaintiffs as claimed by their patent, to the extent set forth in an account furnished under an order on the equity side of this court; also that the subject matter of the patent is so far useful as to come within the meaning of the law. But it is contended that the patent is void for two reasons. 1. Because the thing patented was not a new invention of the plaintiffs. 2. Because the specification which accompanies the patent is defective, in not discriminating between the old and new machine, and specifying the improvement patented; and by embracing in it the old parts of the machine, making the patent broader than the invention. These objections depend on the acts of congress directing patents to be issued on certain conditions,

[Whitney et al. v. Emmett et al.]

which must be complied with in order to give action to the special authority conferred. 2 Peters 18, 21.

The subject matter of a patent is "the invention of any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereon, not known or used before the application." Act of 1793, 1 Story 300, 301, &c.

No question is raised as to the utility of the plaintiff's machine; the word "useful" in the law is well settled to be used in contradistinction to frivolous improvements and inventions, or such as are injurious to the public; 1 Mason's Rep. 185, 302; 4 Mason's Rep. 6; the want of utility may be a good reason for not issuing a patent, but is no cause for avoiding it. 1 Peters's C. C. Rep. 403, 480; 4 Wash. 12. The first important inquiry therefore is, whether the plaintiff's patent is for a new improvement or invention made by them. It had been the subject of much difference of opinion, whether the words "not known or used before the application," in the first section, meant, "but had been in use or described in some public work anterior to the supposed discovery," as in the sixth section, or "known or used previous to such application for a patent," as in the first section of the act of 1800, 1 Story 752.

It had been decided in the circuit courts that the previous knowledge and use related to the discovery, and that a patent was good though the invention was known and used at the time of the application, as the patent would relate to the discovery, unless the patentee had permitted its use under such circumstances as to authorize the presumption of abandonment, or dedication of the invention to public use. 1 Paine 300, 352; 1 Gall. 472; 4 Wash. 72, 541, 708; 2 Wash. 345; 4 Mass. 111.

But in *Pennock v. Dialogue*, the supreme court have referred the words "known and used" to the application for the patent, according to the construction given by the English courts to the statute 21 Jac. 1, ch. 3, sect. 5; 3 Ruff. 92, the words of which are, "which others at the time of making such letters patent and grants shall not use," which is thus construed, "for albeit it were newly invented, yet if any other did use it at the making of such letters patent, or the granting the privilege, it is declared and enacted to be void by this act. 3 Co. Inst. 184; Vide 3 Wh. 514, S. P.

A previous use to avoid a patent must not be a private or surreptitious use in fraud of the patentee, but a public use by his consent, by a sale by himself, or by others with his acquiescence, by which

[Whitney et al. v. Emmett et al.]

he abandons his right, or disables himself from complying with the law; it is deemed a fraud in law to take out a patent after such use. 2 Peters 20; 4 Wash. 538; Holt's N. P. 58, 60.

But unless the invention has been more or less used by others, or publicly communicated by the patentee, his patent will be sustained; the rule is well illustrated in the English cases, as adopted by the supreme court. If the first inventor makes the discovery in his closet, and confines the knowledge to himself, such knowledge will not invalidate a subsequent patent to another for the same thing. On the other hand, though persons engaged in the business to which it relates are generally ignorant of the invention, yet if one person had used it for some time with the knowledge of his two partners, and two servants engaged in its manufacture, and it appeared that a chemist had, in conversation with the patentee, suggested the basis of the invention; or when he had been informed of it by a person whom he employed to make models of the machine; or had adopted a machine which had been in a degree before used by a few, though a general ignorance of it was proved by many persons engaged in the trade, the patent is not good. Davis's Pat. Cas. 61; 2 H. Bl. 470, 487; 8 Taunt. 396, &c. and cases cited; S. C., 4 C. L. 375.

The priority of knowledge and use is a question of fact, which a jury may decide on the evidence of one witness; though numerous others of the greatest knowledge and skill in the matter are wholly ignorant of the invention, the question is on the credibility, not the number of witnesses. 8 Taunt. 395; 4 Wash. 69, 72, 543, 544. The time during which the thing patented had been known and used is not material, the criterion is its public, not its private or surreptitious use, but the use with the consent of the inventor express, or implied from circumstances. A patentee may take a reasonable time to make his specification, drawings, model, to try experiments on the effect and operation of his machinery, in order to know whether the thing patented can be produced in the mode specified; he may disclose his secret to those he may wish to consult, or call to his assistance any persons to aid him in making or using his machine, and preparations for procuring his patent. So if the machine is to operate publicly, as in steam boats, a public experiment may be made, or if the patentee is informed that others are using his invention, he may disclose it to them in order to give notice of what it consists, and caution them against its infringement. In either of these and like cases, a disclosure of the secret would not be such

[Whitney et al. v. Emmett et al.]

previous knowledge, or the use of the invention be such an use, as would impair the patent if taken out in a reasonable time after the discovery, the question of due diligence or negligence is for the jury on all the circumstances of the case. Though the discovery by the patentee is new, yet if he is guilty of negligence in procuring his patent, by which the invention has become publicly known, and used by any persons, he has no right of action, the use must be surreptitious in fraud of his right in order to protect it. As to the novelty of the invention the rule is this, "it must be new to all the world, not the abstract discovery, but the thing invented, not the new secret principle, but the manufacture resulting from it; it must be new at the time of the application for the patent, in the words of the law; 2 Peters 20, 22; but it will be considered as new then, if the application is within a reasonable time after the discovery, if the patentee has not sold or permitted the use of the invention. There is this difference between the patent law of England, and the United States, arising out of the phraseology of their respective laws; the words of the statute of James are, "new manufacture within this realm," which are held to authorize a patent for an invention known and used in other countries, if it is new in England. 1 Salk. 446, 447. By the act of 1800, which is a gloss or commentary on the act of 1793, 2 Peters 22, the patentee must prove that the "invention hath not been known or used in this or any foreign country," hence it is held void if known or used before any where. 1 Peters C. C. Rep. 400; 1 Wash. 170; 2 Wash. 311; 3 Wash. 433; 4 Mas. 109. The novelty of an invention is either the manufacture produced, or the manner of producing an old one; if the patent is for the former, it must be for something substantially new, different from what was before known; if the latter, the mode of operation must be different, not a mere change of the form and proportions; if both are the same in principle, structure, mode of operation, and produce the same result, they are not new, though there may be a variance in some small matter for the purpose of evasion, or as a colour for a patent. Nor is a discovery of some new principle, theory, elementary truth, or an improvement upon it, abstracted from its application, a new invention. But when such discovery is applied to any practical purpose, in the new construction, operation or effects of machinery or composition of matter, producing a new substance, or an old one in a new way, by new machinery, or a new combination of the parts of an old one, operating in a peculiar, better, cheap-

[Whitney et al. v. Emmett et al.]

er, or quicker method, a new mechanical employment of principle already known, the organization of a machine embodied and reduced to practice on some thing visible, tangible, vendible, and capable of enjoyment, some new mode of practically employing human art or skill. It is a "discovery," "invention" or "improvement," within the acts of congress, and a "new manufacture by the statute of James." 2 Gall. 55; 1 Mas. 191; 3 Wash. 449; 4 Wash. 71, 542; 7 Wheat. 361, 431; 8 Taunt. 391; 4 Burr. 2361; 2 H. Bl. 468; 8 D. & E. 95; 2 B. & A. 349; 1 Gall. 481; 4 Mason 6, 9. A patent may be for a mode, or method of doing a thing, mode when referred to something permanent, means an engine or machine, when to something fugitive, a method, which may mean engine, contrivance, device, process, instrument, mode and manner of effecting the purpose; the word principle may mean engine in an act of parliament under which the patent issued, or may mean the constituent parts thereof. A patent for a method of producing a new thing, may apply to the mechanism, a new method of operating with old machinery, or producing an old substance; a patent for a mode or method detached from all physical application, would not refer to an engine or machine, but when referred to the mode of operation, so as to produce the effect, would be considered as for an engine or machine. The words used as mode or method, are not the subject of the patent; it is the thing done by the invention, and patents are so construed *ut res magis valeat quam pereat*.

On this principle the patent of Mr Watt "for a method of lessening the consumption of steam and fuel in fire engines," was sustained; as the intent was apparent, no technical words were deemed necessary to explain its object; and it was held to be a patent for an engine, machine and manufacture; such is the established law here and in England. 3 Wheat. 512; 8 Durnf. & East 107, 108; 3 Ves. 140.

You will apply these rules and principles of law to the whole evidence, without regarding so much the words as the evident intention of the patent; ascertain what is the subject matter of the patent, and the thing patented, next whether it was invented by the plaintiffs, and then whether it had been known and used before the application for the patent, in this or any other country, in such a manner as, within the rules laid down, would invalidate the right of the privilege granted.

The plaintiffs must make out their case to be within the law in

[Whitney et al. v. Emmett et al.]

all the particulars required, slight evidence is sufficient; 1 Durnf. & East 606, 607; 2 Peters 18, 19; if you believe plaintiffs' witnesses, their testimony is in law sufficient to establish their right, so far as respects their invention and its novelty; the burthen of proving the previous invention, knowledge or use of the thing patented is on the defendants. They have given evidence sufficient in law to prove it, if you are satisfied of its truth in fact; the plaintiffs must rebut it by legal and credible evidence, or your verdict must be for the defendants. On this part of the case you will decide according to your opinion as to the matter of fact. Should you find that the plaintiffs are the inventors of the thing patented, and that it was not known or used so as to affect the validity of the patent, the next question is one of law, whether the invention claimed is a proper subject matter for a patent. On this point we have no hesitation in instructing you, that it is an improvement on a machine, manufacture or composition of matter, within the words and meaning of the law.

The next inquiry is, whether the patent is affected by the objections founded on the specification, viz., that it is broader than the invention, and otherwise defective. This depends on the construction of the words used to denote the intention of grantor and grantee, "as the end and scope of the matter, which is the matter itself, and the intent thereof also accomplished." Pl. 18, a.

The patent is for a new and useful improvement in the mode of manufacturing glass knobs, which is broad enough to include the whole machinery described in the specification, including the old machine and the old process of manufacture, not claimed by the plaintiffs as their invention. But the subsequent words summing up the invention intended to be patented, disclaiming the invention of the mould and other parts of the old machine, and declaring the patent to be for a new combination of the various parts of the mould, with the use of the pin and machinery before described, operate as a proviso restraining and limiting the patent to the object so specified, and excepting all other parts from the more general description. The disclaimer, at the close of the specification, estops the patentee from setting up any privilege to the part disclaimed, and the summary is equally binding on him, as a limitation to the thing patented. 2 Mason 112; 4 Wash. 14, 704; 8 Durnf. & East 96, 103, 107. The specification is a part of the patent, and, taken together, they show that the subject matter patented is not the old machine, or its

[Whitney et al. v. Emmett et al.]

constituent parts in their distinct operations ; but the combined result of the new and old machinery, produced by a new combination, addition and improvement. "The distinction between a machine and an improvement on a machine, or an improved machine, is too clear for them to be confounded ; a grant of the exclusive use of an improvement in a machine, principle or process, is not a grant of the improvement only but the improved machine, an improvement on a machine and an improved machine are the same." 3 Wheat. 456, 509, 517 ; 7 Wheat. 356, 423 ; 4 Wash. 9, 14, 709 ; 1 Gall. 482. A patent for a machine, consisting of an entire new combination of all its parts, is good, though each part has been used in former machines, if the machine is substantially new in its structure and mode of operation ; but if the same combination existed before, in machines of the same nature, up to a certain point, and the invention consists in adding some new machinery, in some improved mode of operation, or some new combination, the patent must be limited to the improvement, if it includes the whole machine it cannot be supported. 7 Wheat. 430, 431 ; 2 Marsh. 211, 213 ; 2 H. Bl. 487 ; 1 Peters's C. C. Rep. 343 ; 1 Gall. 482 ; 2 Mason 116 ; 4 Wash. 543. A patent must not be broader than the invention, or it will be void, not only for so much as had been known or used before the application, but also for the improvement really invented. Bull. N. P. 76 ; 11 East 110 ; 1 Gall. 440 ; 2 Gall. 54 ; 1 Mason 188 ; 2 Mason 109, 111.

The improvement patented must be the improvement invented ; 8 Taunt. 394 ; 3 Mer. 629 ; if for a discovery, it must be for something new, not for an improvement only, each item must be a new invention, and the discovery must not fail in a material part ; 2 B. & A. 345, 351 ; 4 B. & A. 549, 552 ; 1 Durnf. & East 605, 606 ; 2 Marshall 213, 214 ; 7 Wheat. 430 ; if for an improvement on a machine, the patentee must show the extent of the improvement, so that a person who understands the subject may know in what it consists ; 3 Wheat. 518 ; it need not describe the old machine, but must limit the patent to such improvement. 7 Wheat. 435.

In using the word patent, in reference to the description of the thing patented, we must be understood as including the patent, the specification attached to it, with the model and drawing in the patent office, all of which are to be taken together as the description.

In deciding on its sufficiency, the court inspect the whole description as one paper, which they assume to be true in fact, and if found

[Whitney et al v. Emmett et al.]

to be in conformity with the requisitions of the law, so that it appears with reasonable certainty, either from the words used or by necessary implication, in what the invention or improvement consists, as claimed by the patentee, they will adjudge it sufficient. 1 Mason's Rep. 188, 189. A description, though in some respects obscure, imperfect, or not so intelligible as to fully answer all the objects of the law, is good if it enables the court to specify the improvement or invention patented, from the face of the patent and accompanying papers. It is enough if there is a substantial description of the thing patented, though defective in form or mode of explanation. In this respect the papers will be viewed in the same light as a declaration in a suit at law; the court, looking on them as a statement of the patentee's right and title, will overlook all defects in the mode of setting it out, if it contains a substantial averment of such matter as suffices in law to make out a cause of action. This is a question of law which the court decides, it is a question for the jury to decide, whether the statements are true in fact; the court does not look beyond the patent and the other papers, but the jury decide from the papers, the evidence of the witnesses, an inspection of the old and new machine and the model, to ascertain whether in point of fact the specification, as made out at the trial, is sufficient. 7 Wheat. 428, 433, 435, 366, 456, 457; 11 East 113; 14 Ves. 131, 135; 3 Ves. 140; 1 Paine 207, 446; 1 Durnf. & East 602, 604; 8 Durnf. & East 100, 108; 2 H. Bl. 473; 8 Taunt. 401; 1 Mason's Rep. 189.

In the present case our opinion is, that the description is sufficient in law, but whether it is sufficient in fact, is for you to decide according to your own opinion on the evidence, a comparison of the old and new machines, the mode of operation, the effect produced, and an examination of the model and all the papers. If the new machine, and its mode of construction and operation, is so explained as to enable you to specify the distinct improvement patented, then the specification is good in law and fact, unless it appears that something has been omitted which is required by the acts of congress to make the patent valid.

The third section of the act of 1793 directs certain things to be done by the applicant for a patent before he is entitled to it, and gives the reasons therefor, but does not declare that the patent shall be void, if all the acts directed have not been complied with previously to its being granted.

[Whitney et al v. Emmett et al.]

The sixth section specifies the cases in which the patent shall be void, which are not the omission of what was directed in the third section, but the defendant proving "that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person, in either of which cases judgment shall be rendered for the defendant, with costs, and the patent shall be declared void."

It is the exclusive province of the legislature to discriminate between what acts are to be done to authorize a patent to issue, and those which will make it void if done or omitted. When this has been done in clear explicit terms, a court cannot superadd requisites to the grant of the patent, or include other acts than those specified, which authorize them to declare it void, or so declare it if the specified acts or omissions are not proved to be fraudulent, or the thing patented was not new, &c. Laws are construed strictly to save a right or avoid a penalty, they are construed liberally to give a remedy, or to carry into effect an object declared in the law; but if a court, by construction, add an object not so declared, apply the penal provisions of the law to a case not within its definition, or exclude from the remedy provided a case defined, it is judicial legislation of the most odious kind, necessarily retrospective, and substantially and practically ex post facto. It is equally so to confound the parts of a law which are merely directory as to the acts to be done, with those which prescribe acts as conditions precedent to the vesting a right, or define those acts or omissions which authorize a court to annul a grant; for the direct effect would be, to impose on a plaintiff in a patent cause a forfeiture of his right by construction, when by the provisions of the law he was entitled to damages treble the amount of the injury he had sustained. No case could arise in which the language of the supreme court, in *Fletcher v. Peck*, would be more forcibly applicable; the character of ex post facto legislation, so severely reprobated in their opinion, would not depend on the tribunal which exercised it. Vide 6 Cranch 138, 139.

We cannot therefore give our sanction to the positions assumed by

[Whitney et al. v. Emmett et al.]

the defendants' counsel, that the patent is void if the specification is in any respect defective or for whatever cause, and that the public are parties to all suits for the infringement of patent rights. Congress have, in the sixth section, prescribed the rules of our decision in cases between individuals, and defined the causes for declaring a patent void on proof by a defendant; the trial is on a question of property, of private right, unconnected with the public interest, and without any reference to the public, unless a case is made out of a design to deceive them, and we cannot better express our sentiments on this subject, than in the words of a great English judge. "It is said it is highly expedient for the public, that this patent having been so long in public use, after Mr Arkwright had failed in that trial, should continue to be open; but nothing could be more essentially mischievous, than that questions of property between A and B, should ever be permitted to be decided upon considerations of public convenience or expediency. The only question that can be agitated in Westminster Hall is, which of the two parties, in law or justice, ought to recover." By lord Loughborough. *Arkwright v. Nightingale*, Davis's Patent Cases 56.

We know of no principle which affords to this court a safer guide in administering justice in this building. Congress seem to have adopted it in the tenth section, by authorizing the district court in certain cases, by a summary process in the nature of a *scire facias*, to repeal the patent, which is a public prosecution in which public considerations operate, the sixth section is confined to civil suits in the circuit court. Herein consists an important difference between the patent law of England and this country. The statute of James I. did not regulate the action for an infringement of a patent right, consequently the English courts could only render judgment for the defendant, if the patent was not valid; they could not declare it void by a regular judgment, and the plaintiff could bring successive actions. The patent could be annulled, only by a *scire facias* in chancery, at the suit of the king; *King v. Arkwright*, Davis 144; and in a suit for damages, nothing could be decided but the right of property; Davis 56; the law of England having been thus declared in 1785, accounts for the sixth and tenth sections of the act of 1793, which were evidently predicated on these decisions, and passed with a direct reference to them, as held by the supreme court in 2 Peters 14.

In referring to the English adjudications on the statute of James,

[Whitney et al. v. Emmett et al.]

we must therefore be careful to take the expressions of the judges in civil suits at common law, that a "*patent is void*," as not meaning that it becomes void by a judgment in favour of a defendant, on the ground of its invalidity in law ; but only that it is voidable in chancery on a scire facias for that cause, and in a court of law, void as a legal foundation for an action for damages. A judgment in a court of law concludes only the parties to the suit, the patent may be given in evidence in other suits against new defendants, till it is cancelled in chancery ; here it becomes annulled by a judgment in favour of a defendant in a circuit court, on proof of the kind required by the sixth section, or a judgment in the district court against the patentee, according to the provisions of the tenth.

In England a patent is granted as a favour, on such terms as the king thinks proper to impose ; Godson 46, 48 ; 4 B. & Ald. 553 ; here a patent is a matter of right, on complying with the conditions prescribed by the law. 1 Paine 355. There the patent is not accompanied with a specification, none is filed or enrolled at the time, but it is done within the period prescribed in a proviso, setting forth the requisites of the specification, as conditions to be performed in order to make the patent valid, if not done it declares the patent void ; these conditions are in the discretion of the king, but neither they or the objects or reasons for granting the patent are declared or set forth ; but the patent contains a declaration, that it shall be construed and adjudged, most favourably and benignly for the best advantage of the grantee, notwithstanding any defective and uncertain description of the nature and quality of the invention and its materials. Godson 50, 155, 157, and cases cited ; Bull. N. P. 76 ; 11 East 107 ; 14 Ves. 136.

In deciding on the sufficiency of these specifications, lord Mansfield states the questions to be, whether it is sufficient to enable others to make up the thing patented, and the public to have the benefit of the invention after the patent has expired. Bull. N. P. 76, 77 ; Liardet v. Johnson, 1778.

These are the two tests which are applied to the specification, not by the words of the statute, but by the courts, in order to effectuate its supposed policy, as is very clearly expressed by Buller, J. in the King v. Arkwright. "The party must disclose his secret, and specify his invention in such a way that others may be taught by it to do the thing for which the patent is granted ; for the end and meaning of the specification is to teach the public after the term for which

[Whitney et al. v. Emmett et al.]

the patent is granted what the privilege expired is, and it must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it. This I take to be clear law as far as respects the specification, for the patent is the reward which, under an act of parliament, is held out for a discovery, and therefore, unless the discovery be true and fair, the patent is void; Davis 106, 128; such is the settled rule in England; Davis 55 to 60; 1 Durnf. & East 605, 608. In its practical application it has been uniformly held, that the clearness of the specification must be according to the subject matter of the patent, it is addressed to persons in the profession, having knowledge and skill in the subject matter, from the nature of their business; if they can so understand it as to make the thing patented, by following the directions of the specification and plan, taking the old machine to their assistance, without any new invention of their own, then the patent is good, though men ignorant of the subject to which it relates may not understand it. Davis 56, 128; 11 C. L. 472; 11 East 108.

The patentee must specify his invention clearly and explicitly; any ambiguity affectingly introduced into the specification, or any thing done to mislead the public, will make it void. 1 Durnf. & East 606, 607. If the specification is sufficient in any part, any other part which is not necessary to understand it may be rejected as surplusage; 2 H. Bl. 489; 11 East 111; one part may be substituted for another. 1 C. & P. 566; 11 C. L. 468. If the patentee of an old machine procures a new patent, with certain improvements on the old machine, reciting the old patent, and with a specification of the whole machine so improved, but not describing the new parts or referring to the old specification, the new patent was held good by a reference to the old specification and drawing, and comparing the new with them; 11 East 101, 113; the patent of Mr Watt was sustained on the same principle; the description was held good by referring a workman to the old engine.

The great object of the specification is to prevent the public from being misled by an evasive one having such tendency; a patent is a bargain with the public, in which the same rules of good faith prevail as in other contracts, and if the disclosure communicates the invention to the public the statute is satisfied. 14 Ves. 131, 136; 1 Durnf. & East 606, 607.

As the English statute does not require a specification, these rules and principles are matters of judicial construction, on which the

[Whitney et al. v. Emmett et al.]

English courts act without any statutory directions. Their patent law is a proviso, excepting from the general prohibition of grants of monopolies by the king, "grants of privilege" "for the sole working or making of any new manufacture within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters and patents shall not use, so as they be not contrary to law," &c. Sect. 5, 3 Ruff. 92. On this proviso their whole system of jurisprudence as to patents is built, by a series of adjudication according to what the judges presumed to be the object and intention of parliament. The silence of the law left a wide field open to the discretion of courts, in adopting such rules as would best effectuate its design, and best promote the interests of the public. But in this country the law is more explicit.

The constitution gives congress the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." This is a declaration by the supreme law of the land, of its objects and purposes, and the means of effecting them, which leaves no discretion to the judges to assign or presume any other or different ones.

The acts of congress of 1790, 1 Story 80, and of 1793, 1 Story 300, are the execution by congress of their constitutional powers; the title of these acts is "to promote the progress of the useful arts;" the mode of doing it is by granting patents pursuant to the enacting clauses. The conditions of such grants are prescribed, among which is a specification or description of the invention to be patented, the requisites of which are defined: "and shall deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear and exact terms as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same. And in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." As to the specification then nothing is left to construction as to its requisites or purposes, both are so clearly defined, and in such a manner as to leave no discretion in courts to presume what was intended, to alter, add or diminish, where the law is so explicit.

[Whitney et al. v. Emmett et al.]

With the constitution, the English statute and the adjudication upon it before them, congress have declared the intention of the law to be to promote the progress of the useful arts by the benefits granted to inventors; not by those accruing to the public, after the patent had expired, as in England. This is most evident from their imposing as conditions, that the invention must be new to all the world, and the patentee be a citizen of the United States. If public benefit had been the sole object, it was immaterial where the invention originated, or by whom invented; but being for the benefit of the patentee, the meritorious cause was invention, not importation, and the benefit was not extended to foreigners, in which respects the law had been otherwise settled in England.

Here the patent contains no proviso declaring it void, if the specification is not in conformity with the law; this is provided for in the sixth section as a substitute for the proviso, and defines the causes for which a circuit court can adjudge a patent void, in a civil suit, for defects in the specification. These are concealment or addition, fully appearing to have been made for the purpose of misleading the public, which is wilful fraud clearly proved; but the court cannot bring within this definition a patent with a specification defective on other grounds, still less act upon the English principle, that the specification is for the purpose of giving the public the benefit of the invention, after the expiration of the patent, as that would be in contradiction to the act of congress expressly assigning other reasons. Such has been the uniform construction of the law in the circuit courts, that a patent can be declared void for no other defect in the specification than fraudulent concealment or addition. 1 Peters's C. C. Rep. 401; 1 Wash. 171; 3 Wash. 198; 1 Mason 189, 190; 1 Gall. 434; 7 Wheat. 429, 430.

No discretion is left to the circuit courts to annul a patent for any reason not contained in the acts of congress; they have not left us free to infer motives, objects and grounds of supposed policy for requiring specifications; the third section of the act of 1793 defines them without any declaration, that the patent shall be void if the specification is defective. English decisions therefore, founded on the assumed reason for the grant of a patent, are not of authority here where the constitution and laws give other reasons, and omit the one founded on the public benefit to result from the disclosure after the expiration of the privilege. You will therefore not make that a subject of deliberation, for it is not material whether the

[Whitney et al. v. Emmett et al.]

public can profit by the invention during or after the term of the patent. The true inquiry is whether, in the spirit of the law, the plaintiffs have made such a description of the thing patented as to distinguish it from all others before known, and to enable others skilled in the matter, to make, compound or use it, and to explain the principle and mode of application by which it can be so distinguished from other inventions. If from the patent, specification, drawings, model and old machine, clear ideas are conveyed to men of mechanical skill in the subject matter, by which they could make or direct the making of the machine by following the directions given, the specification is good within the act of congress. 3 Wheat. 518; 7 Wheat. 435.

If the plaintiffs' patent is valid, it gives them a right of property in the thing patented, which is entitled to full protection in courts, the wise policy of the constitution and laws, for securing to inventors the exclusive privilege to use their discoveries for a limited time, has been fully illustrated by the great results produced by the skill of our citizens. Intended for their protection and security, the law should be construed favourably and benignly in favour of patentees, in the spirit of the proviso in patents in England. When the invention is substantially new, is useful to the public, and the disclosure by the specification and other papers, is made in good faith, and fairly communicated in terms intelligible to men who understand the subject, juries ought to look favourably on the right of property and to find against a plaintiff only for some substantial defect in his title papers, or proof.

Having given you our opinion on all the questions of law applicable to the case, it is submitted to your verdict.

If you think the thing patented not new, but had been known or used any where, before the application for the patent, you will find generally for the defendants; so you will find, if the alleged improvement is in fact only a change of the form and proportions of the old machine or process.

If you think the specification, &c. not descriptive of the invention, so as to be in compliance with the requisitions of the third section of the law, through accident, mistake or ignorance, you will find for the defendants, and specify the ground of your verdict.

If you think the defect in the specification was intended to mislead the public, or should find against the plaintiffs on any other ground specified in the sixth section, you will specify it in your find-

[Whitney et al. v. Emmett et al.]

ing, so that the court may render the proper judgment, either generally for defendants, or add a judgment the effect of which will annul the patent.

If you think the plaintiffs have made out their case, you will find such damages as they have proved they have actually sustained, they must prove their damages, if they have not done so you are not to supply the defect.

Verdict for plaintiffs 500 dollars.

A motion was made for a new trial for excessive damages, which was argued at October term 1831.

Mr C. Ingersoll and Mr C. J. Ingersoll, for defendant.

The jury have exceeded the actual damage sustained by the plaintiff, which the law has made the standard for their verdict.

By the fourth section of the law of 1790, 1 Story 81, the plaintiff was to recover "such damages as shall be assessed by a jury," by the fifth section of the act of 1793, "three times the price of a license to use the invention;" 1 Story 302; by the third section of the act of 1800, 1 Story 753, "three times the actual damages sustained from or by reason of such offence." The meaning of this clause is apparent by a reference to the statute of James I., section 4, "shall recover three times so much as the damages he or they shall have sustained by means or occasion," &c.; 3 Ruff 92; by adding the word "actual," congress intended to exclude potential or speculative damages; actual means "real, not potential," Johnson's Dict., "real or effective," "that exists actually," "existing in fact," Webster's Dict., not what may be; 1 Gall. 485; the court must decide what are actual damages, even in case of a tort the jury ought to give the reasons of their verdict; Comb. 357; 2 Wils. 160; the court may ask them what they have made the standard of their verdict in patent cases; 1 Gall. 485; in 1 Wash. 403, 480, Judge Washington referred to the profitable use of the invention by the defendant. In 3 Wheat., App. 26, the value of the use to the defendant is stated as the rule of damages. The injury done to the character of the plaintiffs was by the defendants making an inferior article, the reduction of the price by competition are merely speculative damages; the actual damage sustained, is to be ascertained as in cases of waste, the value of the property or estate wasted. The actual loss sustained by the infringement of a patent, is the

[Whitney et al. v. Emmett et al.]

profit made by the defendant while he uses the invention, the saving of labour by the improved machine, without regarding the value of the use of the parts not patented; the difference in the profits resulting from the use of the old as compared with the new, calculated by the time and extent to which the defendants have used it, is the true rule. In this consists the difference between a common law tort and a patent tort, in the former the jury have a discretion in awarding damages, in the latter they have a standard prescribed to them, as definite as on a contract for the payment of money or the delivery of goods; the damages cannot exceed the interest, so in patent cases, the defendant's profits are the measure of the plaintiff's loss.

Mr Cadwalader and Mr Sergeant, for plaintiffs.

The third section of the act of 1800 is a substitute for the fifth section of the act of 1793, and actual damages mean, the injury actually sustained, and the consequences of the infringement, which are not too remote to be traced to it, the words "for or by reason of," &c. put a patent tort on the same footing as any other tort. 1 Peters's C. C. Rep. 397. A consequence of increased competition is a reduction of profits, the putting an inferior article into the market tends to throw out the pressed knob and substitute the blown knob in its place, whereas, on a fair comparison, the pressed are preferred. Here, as the infringement has been intentional, the plaintiff ought to recover the difference between the cost and the selling price of the knobs made by the defendants, by the use of the plaintiffs' improvement, which the jury have not exceeded, though they might have made an allowance for damages occasioned by wilful vexation, as may be done in trover, 6 Serg. & Rawle 426; no new trial will be granted, unless there has been a plain mistake in law or fact, 3 Binn. 320; or if damages are too small or too large, unless for some other cause in addition; 1 Wash. 154, 202; the case in Comb. 357, 358, only shows that the jury will not be allowed to exercise a despotic power. In 1 Gall. 485, 350 dollars were given for merely making the machine, and a new trial refused; S. P., 1 Peters 397; these cases establish the rule that the jury may judge of the actual damage, as in the case of tort generally; those which affect the person or reputation of another are exceptions. The true question is, not what profits the defendants have made by the infringement, but what loss the plaintiffs have sustained; of this the jury are the pro-

[Whitney et al. v. Emmett et al.]

per judges, and the court will not disturb their verdict, unless they decide positively that the plaintiffs have not sustained 500 dollars damages in any view of the case. The jury may ascertain the damages from any cause which has injured the plaintiff, the difficulty of liquidating them under any definite head, as a matter of account, is no objection to their putting an estimate on the amount; as the loss of sales which the plaintiffs would have made had there been no infringement. In a word, the jury may allow the plaintiff whatever they may think from the evidence he has lost by the violation of his right by the defendants, and put him in the same situation as if he had had the exclusive use of his invention during the time the defendants have used it.

The opinion of the Court was delivered by HOPKINSON, J.

The motion for a new trial in this case is rested on the alleged excessiveness of the damages. The act of congress gives the rule of damages, and if it has been violated, the verdict ought not to stand; on the other hand, the finding of a jury on a question so peculiarly within their province, will not be disturbed, unless it be made clear that they have disregarded and exceeded the measure of the law.

The congress of the United States, after two attempts, which proved to be unsatisfactory, to fix the amount of damages to be recovered from any person who should make, devise, use or sell the thing whereof the exclusive right is secured to a patentee, by an act passed on the 17th of April 1800, established a rule which has since remained as the law of such cases. The third section of the act enacts, that any person offending as above mentioned "shall forfeit and pay to the said patentee, his executors, administrators and assigns, a sum equal to three times the *actual damage sustained* by such patentee, his executors, administrators or assigns, from or by reason of such offence." The practice under this act has been for the jury to find the actual or single damages, which are afterwards trebled by the order or judgment of the court.

It is obvious that the directions of the last act of congress are not, and could not be precise on such a subject, and that a considerable latitude is necessarily given to the jury in estimating what they shall consider to be the actual damage sustained by a patentee by the violation of his right; and the courts of the United States have shown no disposition to draw the power of the jury, in this respect,

[Whitney et al. v. Emmett et al.]

within close and narrow limits. The elements of such a calculation in various cases that occur, are so various, and sometimes in their nature so uncertain, that the estimate of a jury must be very extravagant to enable the court to say, that they have so disregarded the rule of the law, and so clearly exceeded the limits of their authority, that their verdict cannot be supported. Are the jury to take as the actual damage sustained by the patentee, the benefit or profit made and received by the offender by the use of the invention? or the profit which the patentee would have made by the same use of his invention, but has lost by the illegal interference with his right? May they deduce the latter from the former, and consider proof of the profits made by the offender to be evidence in fact of the injury or damage sustained by the patentee? This is broad ground, on which the jury may rightfully move; and the error of their calculation must be made clear and certain, before the court can undertake to correct it by overthrowing their verdict. Still wider limits have been insisted upon for the jury by the counsel of the plaintiffs. They have contended that, as an item in the estimation of actual damages, the jury may examine and determine the loss sustained by the reduction of the price of the articles manufactured by the patented machine, in consequence of the competition brought into the market against them, when the patentee had a right to a monopoly; and going yet further, they say, that the injury done to the reputation of the manufacture, by the inferior skill and workmanship of the offender, may be fairly and legally brought into the calculation of actual damage. Whether this may or may not be done, must depend upon the particular case under consideration, and the nature of a question of damages shows that what may be a good rule in one case, would be altogether inadmissible in another. All the items or elements above mentioned may be brought into the account, provided that there be evidence satisfactory to the jury to bring them within the character and description of "actual damages," *proved in fact* to have fallen upon the plaintiff, "from or by reason of" the offence of the defendant; but they should not be allowed when they are merely hypothetical, imaginary or speculative. It is not enough that injury may have been suffered by these means; the plaintiff has a right to recover only such damages "as he can *actually prove*, and has *in fact* sustained." It must not rest in conjecture, but must be susceptible of proof, and be actually proved.

While the courts of the United States sitting on patent cases, have

[Whitney et al. v. Emmett et al.]

adhered to these principles in their construction of the act of congress, they have not been inclined to interfere with verdicts, but keeping them within this boundary, have rather given a loose rein to juries in the exercise of their power over the damages. This is abundantly shown by the cases referred to at the bar. In *Whittemore v. Cutter*, decided in 1813, and reported in 1 Gall. 478, the question of the damages to be recovered for the violation of a patent right, was considered by Judge Story. In that case, the plaintiff proved only that the defendant had made his patented machine, and not that he had ever used it. Here there was neither profit made by the defendant or lost by the plaintiff, nor any reduction of the price of the article manufactured by a competition in the market; nor an injury to its reputation by inferior workmanship. Where then are we to look for the constituents of damage in such a case? The counsel for the plaintiffs contended, "that although there is no evidence of actual damage, the jury ought to give damages either to the full value of the expense of making the machine or of the price at which such a machine might be sold." The judge rejected these pretensions for the most satisfactory reasons. He stated to the jury, that "it is clear by the statute that only the *actual damages* sustained can be given;" and he explains this actual damage to mean "such damages as the plaintiff can *actually prove*, and has *in fact* sustained, as contra-distinguished to mere imaginary or exemplary damages." This is a rational and satisfactory interpretation of the phrase. The judge thus instructs the jury, that "if they are of opinion that a use of the machine is actually proved, the rule of damages should be the value of the use of such machine, during such illegal use." This language is not exactly precise. It is not clear whether the judge would be understood; when he speaks of the value of the use of the machine, "he means its value to the illegal use of it, or the value which its owner could or might have derived from it during the time of the illegal use." The rules are or may be very different. If the latter were intended by the judge, it is in fact the *direct* and *actual* damage sustained by the patentee; if the former, it is the profit or advantage made of the machine by the offender, which may be more or less than the patentee would have derived from it. We see, however, no objection to another explanation of the language of the judge, that is, that the jury ought to take the value of the use of the machine to the spoliator, not as the direct ground of their verdict, but as a test or means by which, in the ab-

[Whitney et al. v. Emmett et al.]

sence of other proof, they might estimate the damage done to the plaintiff. In either construction the judge meant to conform to the language of the act of congress, and affirm the rule he set out with, "that only the actual damage sustained can be given." The jury gave 350 dollars single damages, finding at the same time, "that the defendant was guilty of making the machine only;" no attempt appears to have been made to disturb the verdict, although the judge had charged the jury, that in such a case, "the plaintiff can recover nominal damages."

The case of Gray v. James, decided in this circuit in 1817, and reported in 1 Peters 394, was an action for violating the plaintiff's patent right in the art of cutting and heading nails by one operation. Jacob Perkins was the inventor of this machine, which was so defective that, after a trial, it was altogether abandoned; and it did not appear that it had ever been used afterwards by any person. The defects of Perkins's patent were cured by one Jesse Reed, who patented his improved machine; but the two machines were precisely on the same principle. The jury gave a verdict for the plaintiff, and assessed his single damages at 750 dollars. A motion was made on the part of the defendant for a new trial and in arrest of judgment. One of the reasons in support of the motion was, that the damages given by the jury were excessive, and the argument was, that Perkins's machine was acknowledged by himself to be worthless; and that it was in fact thrown away as a useless thing, and was so considered by those who knew any thing about it, consequently his assignees sustained no damage by the use which the defendant made of it. The judge was of opinion that "the premises may be admitted, and yet the argument terminated in what is called a *non sequitur*." We cannot say that we are satisfied with the ingenious reasoning of the learned judge, to support this opinion; nor do we see how the owner of a thing, absolutely worthless, and which he had thrown away as useless, can *sustain any actual damages*, by the use of this thing made useful only by being combined with some thing else, or so changed in its operation by an invention to which the owner of the worthless machine had no title or claim. He has lost nothing, he has been deprived of nothing that was of any value to him, what then has been his injury or damage? If the act of congress had given the advantage or use made by another of a particular machine as the rule of damages, then indeed a worthless invention, made valuable by an improvement, might entitle the

[Whitney et al. v. Emmett et al.]

inventor to compensation for the use of his invention, and perhaps on principles of equity and justice, he ought to have it. But the law does not take this rule, but the damages actually sustained by a patentee by the use of his invention, and not the value that has been imparted to it by a subsequent inventor; nor the use which such inventor has made of it, provided he has not by such use inflicted any loss, injury or damage upon the patentee. His damages, and not another's gain, are made the rule for the jury. It is not like the case of *Whittemore v. Cutter*, where the machine made by the defendant was the same with that patented by the plaintiff, and where we have agreed that, in the absence of other evidence, the jury may assume the value of the use of the machine to the spoliator as proof of the damage or injury done to the patentee. The judge who decided the case of *Gray v. James*, seems to be hardly satisfied with supporting the verdict on the reasoning we have quoted, for he adds, "but the fact is that Perkins's machine was proved at the trial to possess intrinsic value on the single ground of saving labour, whether the value so proved justified the jury in finding the damages which they did, is a question of which this body were the proper judges upon the evidence laid before them, and the court sees no reason to find fault with them."

A patentee however whose invention, though worthless to himself, has become useful to another may not be deprived of it without his consent, *for it is his property*; nor can another use it for any purpose without responsibility to him. Such as it is, of much value or little value, or of no value, the law has guarantied the exclusive possession of it to the inventor, and the law will prevent any interference with his right, and every use of the thing invented against the will of the owner. Although no damages can be recovered by the provisions of the act of congress, in a case where no damages have actually been sustained, the patentee has nevertheless a remedy for the invasion of his right peculiarly appropriate for such a case. He may have an injunction upon the wrong doer, which will prevent the unauthorized use of his invention, and put it in his power to compel the invader either to abandon it or make him a just compensation for the use of it. The court would exercise this power to do what is right and equitable between the parties, and so as to prevent imposition and wrong by either.

Without embarrassing the question now to be decided with a review of all the evidence that has been brought into the discussion,

[Whitney et al. v. Emmett et al.]

it will be sufficient to advert to the admitted fact that the defendants manufactured five hundred and seventy-one dozen of glass knobs, by the use of the machine invented and patented by the plaintiffs; all of which were sold by the defendants, with the exception of some that were imperfect. From the bill produced of one of the sales, these knobs were sold at a great profit. The profit obtained by the defendants on the sale of these knobs was a fair and legal subject for the calculation and judgment of the jury on the evidence laid before them; and they had the same right to take this profit as the rule or measure by which they would estimate the actual damage sustained by the plaintiffs by this invasion of their rights. Although the profit gained by the defendants is not the amount to be recovered by the plaintiffs as their damage, yet it is that from which a calculation or estimate of that damage may be rightfully made by the jury. If in this case the jury have taken this profit as their guide and measure in assessing the actual damage sustained by the plaintiffs, can the court say that they have done wrong, or that under the evidence laid before them we could give them a better rule? Can we say that they have exceeded the power and discretion allowed to them, so that it becomes the duty of the court to undo all that they have done, and set aside their verdict as contrary to the law or evidence of the case? we think not.

If the payment of the sum for which a judgment must be rendered against the defendants shall be oppressive or inconvenient to them we shall regret it, because they appear to have acted under a mistaken opinion of the rights of the plaintiffs, from misinformation in relation to the validity of their claims of invention, and not from an obstinate or malicious design to injure them or benefit themselves by a wilful disregard of the rights of the plaintiffs. An intelligent and impartial jury have passed upon the case; "and the court sees no reason to find fault with them." The plaintiffs having established their right, and having no reason to apprehend any further interference with it, it would have been satisfactory to the court if some reasonable and liberal compromise could have been made with the defendants, who appear to be industrious and useful mechanics, which would have made our judgment unnecessary. We do not feel authorized to press the suggestion further.

Rule discharged.

BLYDENBURGH AND BURNS V. WELSH.

On the 7th of April, A sold B a quantity of coffee "provided it is not sold in New York:" Held, that the sale to B was absolute, if the coffee had not then been sold; the proviso does not refer to a future sale.

A purchaser of goods is not bound to answer the inquiries of a seller respecting the state of the market.

If after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it on a condition which he has no right to exact, he thereby waives the fraud and cannot set it up in an action on the contract.

What is fraud in a purchaser of an article of merchandize, considered.

Where no time is fixed for delivery of goods sold, the law makes them deliverable in a reasonable time: if when a demand is made there is no objection made as to time, or it was not then made a question by the vendor, the contract will be deemed to be broken by a refusal.

The rule of damages is the market price of the goods at the time when they were deliverable, a jury cannot give damages beyond the market value, though the refusal to deliver may have been with a view to profit. But if the price was not fixed and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate, according to the conduct of the defendant.

THIS was an action to recover damages from the defendant, for not delivering a quantity of coffee agreeably to a contract between him and the plaintiffs, through the agency of Joshua Percival, a regular broker employed by the plaintiffs.

The contract was as follows:

"Sold Mr Percival all the coffee purchased from Mr Jacobs, said to be about two hundred and eight thousand pounds, at 17½ cents, at four months, or two per cent off, provided it is not sold at New York.

"J. WELSH."

"7th of April 1825—about eight o'clock, A. M., or between eight and nine o'clock.

"J. PERCIVAL."

The quantity of coffee was two hundred thousand nine hundred and fourteen pounds, the price at 17½ cents, was 35,662 dollars 23 cents.

Policy of insurance, at Boston, 8th of April 1825, by B. & B., 41,000 dollars (exact amount being unknown).

[Blydenburgh and Burns v. Welsh.]

The following letters and papers were read by the plaintiffs:

“ Philadelphia, 13th of April, 1825.

“ SIR,—Circumstances connected with the purchase of coffee, which you made of me in the morning of the 7th instant, came to my knowledge yesterday, which will, in my opinion, annul the contract; but in order to avoid inconvenience, I will give the bill of parcels, and deliver the coffee, if your employer, Mr Blydenburgh, is prepared to make the payment, (yesterday he had not the acceptances) on condition that an amicable action is entered in the circuit court of the United States to try the question, and if the contract is unlawful, to assess the damages I have sustained. Also, on condition that I am protected from the claim of William Read for Le Roy, Bayard & Co., if any should be made.

“ Yours, respectfully,

“ J. WELSH.

“ To J. PERCIVAL.”

“ Philadelphia, 23d of April, 1825.

“ To BLYDENBURGH & BURNS, New York.

“ Mr Read informs me that he is not authorized to give up the claim of Le Roy, Bayard & Co. to the coffee, and renews the proposal he made (which you rejected), of submitting it to friends. On receiving a protection from you against this claim, either the paper handed you for signature the 12th of April, or any other, I will deliver you the coffee, which remains where it was stored the 7th and 8th instants. I will not say a word about this transaction more than that I want the funds, and feel a sincere desire to end the unpleasant controversy. Should you decline, I intend to ship the coffee, having a vessel ready, or dispose of it.

“ Yours, respectfully,

“ J. WELSH.”

Paper handed Mr B. for signature :

“ Should any expense or damages arise from a claim for the purchase or supposed purchase or sale of coffee in New York, belonging to John Welsh, and which we purchased on condition it was not sold in New York, we hereby promise to pay all expense or damage, and clear the said Welsh of all liability.”

“ It is admitted by the defendant, that on the 14th of April 1825, the plaintiff, Blydenburgh, called on the defendant at his counting-house, and in the presence of a witness, told the defendant that he was prepared to pay him the exact amount of the coffee, in accept-

[Blydenburgh and Burns v. Welsh.]

ances of Messrs P. & J. S. Crary of New York, of bills drawn by Blydenburgh & Burns, and acceptances of Blydenburgh & Burns of bills drawn by J. & S. Crary ; that the defendant said he would not deliver the coffee unless Mr Blydenburgh complied with the terms specified in a note of the defendant to Joshua Percival ; that Blydenburgh then tendered to the defendant seven bills accepted and drawn as above stated, true copies of which are hereto annexed ; that the defendant took the bills in his hand, looked over them ; said he was perfectly satisfied with the paper, and would rather have it than the money, which Mr Blydenburgh told him, if he preferred, he might have, and then returned them to Mr Blydenburgh, saying, he would not deliver the coffee except on the terms before specified. Mr Blydenburgh then told him he should be under the disagreeable necessity of commencing an action against him.

“ RICH. PETERS, for defendant.”

Indorsement on above. “ I agree that the within shall be read in evidence on the trial of the cause. RICHARD PETERS, defendant’s attorney. October 5th, 1830.”

<i>Copies of bills.</i>				<i>Dates.</i>	<i>Payable.</i>
\$5,000 P. & J. S. Crary on B. & Burns,				9 April 1825,	20 July 1825,
5,000	same	on	same	“	26 “
5,000	B. & Burns	on	P. & J. S. Crary	“	1 Aug. 1825
5,000	do.	on	do.	“	10 “
5,000	do.	on	do.	“	13 “
5,000	do.	on	do.	“	19 “
5,662 23	do.	on	do.	“	20 “

\$35,662 23

All dated New York.

It appeared in evidence, that Mr Welsh had made an offer of the same lot of coffee to Mr Read of this place, agent of Le Roy & Bayard of New York, at 17½ cents, at four months, and to deliver it at Hamburg or Petersburg at a certain freight. Mr Read wrote to Le Roy & Bayard on the 6th of April 1825, informing them of the offer, to which they replied on the 7th, stating, that they never purchased, unless the debenture was taken in payment. On the 8th Mr Read offered to take the coffee at short price, the debentures to be in part payment, to which Mr Welsh replied, that if his offer had been unconditional at short price, he would have considered it a sale to Le Roy & Bayard, but as they had not accepted his offer,

[Blydenburgh and Burns v. Welsh.]

it was no sale to them; he had sold it to another person, and it was now too late to sell to them. Mr Read believed he had no right to the coffee, so informed Le Roy & Bayard, and they never sought to enforce the offer, but there was no evidence that such belief was communicated to Mr Welsh. Coffee took a rise on the 7th of April, which continued for some time, the price ranging from 18 to 21 cents. Mr Welsh retained the coffee till the 10th of May, when he shipped it on his own account, invoiced at 19½ cents. It was alleged on the part of Mr Welsh, that the state of the market for coffee was known to Mr Percival on the 7th of April, but was concealed from Welsh and misrepresented; this was denied on the other side, and much testimony taken respecting it, which it is not necessary to refer to, in substance, it was, That on the arrival of the ship Crisis at New York, the accounts from Europe relating to the cotton market caused a rise in that article, but no notice was taken of coffee; on the morning of the 7th of April plaintiff, Blydenburgh, came express from New York, in advance of the mail, and gave orders to Mr Percival to purchase this lot of coffee from defendant, which he had offered the day before, but which Mr Percival had declined. The arrival of the Crisis, and the rise of cotton, was entered on the Coffee-House books before this sale was made, and was known to defendant; the rise in coffee took place on account of sales made on that day, and speculations in anticipation of its rise. The avowed object of the expresses was to purchase cotton, the purchases of coffee were more active, in consequence of calculations on its probable demand, and not from any definite information. At the time of the purchase Mr Welsh asked Mr Percival if there was any thing about coffee, to which he replied, nothing on the books of the Coffee-House except the rise of cotton.

Mr Chauncey and Sergeant, for the plaintiff.

By the terms of the memorandum of the 7th of April, the sale to the plaintiff was absolute, if Le Roy & Bayard did not accept the offer previously made, defendant was not at liberty to make a new one, or to vary the terms proposed. The offer was not accepted, and both defendant and Mr Read considered it as no sale, it was therefore not sold in New York on the 7th. Mr Welsh has no right to claim any indemnity, when he could in no event be subjected to any injury. As no time was fixed for the delivery of the coffee, the law makes it deliverable in a reasonable time, which, in this case,

[Blydenburgh and Burns v. Welsh.]

may be taken to be the 14th of April, when the coffee was demanded, and the defendant made no objections to the time, but offered to deliver it if the indemnity he required was given.

The contract was broken on that day by the refusal to deliver, in consequence of which we have a right to recover the difference between the price at which the coffee was sold on the 7th, and the price at which it could have been purchased on the 14th, with interest from that day. The price was then 20 cents, at less than which the plaintiff could not have purchased, this is the true rule of damages, which puts him in the same situation as if the contract had been complied with. 3 Wheat. 204; 6 Wheat. 118; 2 Conn. Rep. 487; 5 Conn. Rep. 222. The contract was fair, Mr Percival was not bound to communicate his instructions from the plaintiff, nor were either bound to disclose any knowledge they had of circumstances which might affect the market; they did or said nothing tending to impose on the defendant by any falsehood or misrepresentation, and had a perfect right to take advantage of the rise in the market, if they practised no deception on the defendant. The case of *Laidlow v. Orgon* is decisive of this point; 2 Wheat. 178, 195; the silence of a party is not imputable as fraud, unless there is an obligation to disclose, 2 B. C. 420; 10 Ves. 470; 7 Johns. Ch. 201; there must be fraudulent concealment or misrepresentation to taint the contract with fraud. 18 Johns. Rep. 403.

Mr Peters and Binney, for defendants, admitted the rule of law to be as laid down in 2 Wheat. 195, in relation to the communication of the vendee's information to the vendor of goods. In contracts of insurance, the insured must communicate his whole knowledge of every matter material to the risk, but this is not required in other contracts. In contracts of sale the true question is, whether what is said, or omitted to be said, tends to deceive. The party may be silent when asked, for his silence puts the other on his guard, a contract may be avoided though there is no design to mislead or deceive, if what the party say, is calculated to have that effect. An answer may be true, but by reference to the subject matter may tend to deceive, there may be partial truth yet general falsehood, on this subject the same rule prevails as in contracts of insurance, the assertion of a fact includes all natural inferences, *Phill. on Ins.* 82, if the vendor throws himself on the confidence of the vendee, and he either says what is not true, or does not say what is true, it is a fraud in

[Blydenburgh and Burns v. Welsh.]

law, 2 Dow's P. C. 263, 266; 2 Wheat. 186, 190, note, or has knowledge of any fact not disclosed, which is contrary to his representation, 10 Ves. 470. The rule of damages for not delivering articles sold, is not what the vendor could purchase the article for, but the injury sustained; the vendee is entitled only to indemnity, that is, to be put on the same footing, as if the article had been delivered. As a general rule, the price demanded is the market value, for the purchaser must pay it; but if the market is stagnant, if none or but small sales are made, the true rule is, what could the article sold have been sold for, if the plaintiff had had it in his possession, in the state of the market on the 14th of April when it was demanded. The jury must look to what a sale would have produced, and not the price demanded by holders at a time when prices were nominal.

BALDWIN, J., charged the jury as follows.

The contract of sale on the 7th of April was conditional, "provided it is not sold at New York," as the contract is in writing its meaning is matter of law to be settled by the court. In our opinion, it does not refer to a sale to be made in New York after the 7th, but to a sale then made; the proviso is not prospective, so as to bring a future sale within the condition, if it was not sold before the contract was signed, the sale to the plaintiffs was absolute. On the other hand, if the offer made on the 6th had been accepted by Le Roy & Bayard on the 7th, the coffee would have been in law and fact sold on the 6th, and the plaintiffs would have had no right to it. But to make out a sale on the 6th, the precise offer made by Mr Welsh must have been accepted, any variance in the terms would have been a new contract, which he was not at liberty to make. The letter of Le Roy & Bayard of the 7th was not such an acceptance, and was so considered by Mr Welsh and Mr Read, nor do Le Roy & Bayard even seem to have made or contemplated any demand on Mr Welsh. The contract thus becomes divested of the only condition annexed to it, without any right in Mr Welsh to require any indemnity against Le Roy & Bayard. It bound Mr Welsh to deliver the coffee, if it is not infected with fraud in the suppression of truth, or the suggestion of falsehood. On this subject the law is well settled.

To avoid a contract on this ground of fraud, there must be a concealment of something, which the purchaser is bound to communi-

[Blydenburgh and Burns v. Welsh.]

cate to the seller, or some misrepresentation on a matter material to the contract, which misleads and deceives him, or is calculated to do so. But a purchaser may avail himself of information which affects the price of the article, though it is not known to the seller, though the latter inquires if there is any news which affects the price, the purchaser is not bound to answer, and the contract is binding, though there was news then in the place which raised the price thirty or fifty per cent. 2 Wheat. 195.

When the means of acquiring knowledge are equal to both parties, he who first receives it may avail himself of his activity or of accident, but if he makes use of any circumvention or art to conceal the fact from the other party, it will invalidate the contract. The buying and selling merchandize being for mutual profit, the law exacts only good faith, one is not bound to impart to another his views of speculation, his opinion of the effect of news or events, the bearing of the rise of one article on another, or the results of his mercantile skill and knowledge of the markets, fairly acquired, and not unfairly concealed. An unfair concealment is where pains or means are taken to keep the other party in ignorance of material facts, when he asserts a fact not true, or true to the letter but not the sense—not according to the common meaning and acceptance of the words used, and calculated to impose upon or deceive—representing a fact to be one way, but concealing circumstances which bore directly upon it in a contrary way; in a word, any declaration which induces another to buy or sell, on the confidence in its truth, according to the common acceptance of the words used in reference to the transaction, is fraudulent suppression, if the assertion is not strictly true as so understood, though it may be true in another sense different from the ordinary import.

Misrepresentation is asserting what is not true in whole or in part, though not bound to answer a question, yet if the party does answer he must do it fully, fairly and in good faith, so as to give the other the benefit of the question and the information sought: if a representation is voluntarily made without being requested, it must be substantially true in every matter material to the contract. As every contract is presumed to be affected by the state of things as represented, any substantial change will vacate it, because not made according to the meaning and intention of the parties; so where confidence is reposed and abused by unfair concealment. In either case it matters not whether there was a fraudulent instruction. If

[Blydenburgh and Burns v. Welsh.]

the party is in fact deceived and induced by the conduct or declaration of the other to enter into a contract which he would not have made had he known the true state of things, it cannot be enforced.

In applying these rules to this case you will inquire whether the agent of the plaintiff said or did any thing tending to impose on the defendant, from which you can infer an imposition by the buyer upon the seller, according to the principles of fair dealing as understood between merchant and merchant.

Mr Percival was not bound to communicate his instructions to purchase, or his opinion of the effect of the rise of cotton or the price of coffee, nor the state of the market as to the sales of coffee then going on, if Mr Welsh's means of information were the same as his. You will judge from the evidence whether there was any concealment of any other fact material to the sale which ought to have been disclosed, or any untrue representation made in the conversations between the parties. In deciding on this part of the case you will also inquire whether the defendant, on the 13th of April, was ignorant of any facts which had a material bearing on the fairness of the contract ; for on that day he made a written offer to deliver the coffee if the plaintiff would sign the paper of indemnity. This is a waiver of the objection to the contract on the ground of fraud, if he was informed of all matters which bore upon that question, if he remained ignorant of them then it is no waiver.

Should you think the contract fraudulent in law or fact you will find for the defendant, if you think it fair, then the only question will be the amount of damages, as it is clear that there has been a breach by the defendant.

No time being fixed for the delivery of the coffee, the law makes it deliverable in a reasonable time, which depends on circumstances ; as no objection was made in point of time, when a demand was made by the plaintiffs on the 14th of April, and nothing appears in the evidence to show that time ever was or ought to have been made a question between the parties, you may assume that, as the time of delivery, and by the refusal of the defendant, that the contract was then broken.

The rule of law, as to the measure of damages to which the plaintiff is entitled, is the market price or true value of the coffee in the market on the 14th of April, taking all circumstances into view ; you will not confine your inquiry to the price at which the plaintiff could have sold it, if it had been delivered according to contract, or what he

[Blydenburgh and Burns v. Welsh.]

must have paid, if he had purchased on that day; but taking these and all other circumstances together, as bearing on the value of the coffee, as an article of merchandize in the hands of the plaintiff, for the purpose of taking the advantage of the market, decide from the evidence what it was then worth, not its intrinsic but its market value.

The plaintiff must be put in as good a situation as if the coffee had been delivered, he must have a just indemnity for the breach of the contract, but you cannot go beyond the value of the coffee at the time of delivery, whatever opinion you may have of the reasons or conduct of the defendant for not making it. If you are satisfied from the evidence that there was on that day a fixed price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you may adopt that which you think best accords with the proofs in the case. You must take what you believe the market price or value, but may take the range of the market as proved by the witnesses, fixing on the highest, lowest, or medium rate, at your discretion. We think the rule applicable to contracts to deliver stocks a correct one in cases of this kind, by keeping within the range of the market on the day of delivery, to fix on the higher, lower or medium value, as the breach of the contract may have been wilful or innocent in your opinion. The plaintiff is entitled to your verdict for such value, with interest from the day of delivery.

The jury found for the plaintiff, whereupon the defendant's counsel moved for a new trial; 1, for excessive damages; 2, for misdirection by the court, in charging the jury that interest was to be given as a matter of law, whereas it was in the discretion of the jury. This point was not discussed at the trial, and no opinion given on it by the court. A new trial was granted on the first ground.

The opinion of the Court in granting a new trial was delivered by Mr Justice HOPKINSON.

The contract in this case was proved, as it was alleged, by the plaintiff, and the violation of it on the part of the defendant, without any legal warrant or justification, was shown to the entire satisfaction of the court. The plaintiff, therefore, had a clear case, and was entitled to a verdict. The cause was tried with ample preparation on both sides, with great deliberation and ability; and the jury, after hearing it fully discussed by the counsel, and receiving an elaborate

[Blydenburgh and Burns v. Welsh.]

charge from the court, rendered a verdict for the plaintiff, and assessed his damages at the sum of 5391 dollars 18 cents.

The plaintiff moved for a new trial, and in support of his motion has filed various reasons, the argument of which has brought the whole case into the review of the court. We are now to decide upon the motion; another trial is asked. 1. *Because the damages are excessive.*

In assessing the damages for the breach of a contract like the present, the law has established a rule for both the court and jury, which, if it may fail sometimes to do exact justice in a particular case, affords generally as equitable and reasonable a rule as could be given. The damage to be recovered is to be governed by the *price* of the article at the time when it should have been delivered, compared with the contract price. This rule is founded on an hypothesis not always true in fact, perhaps not often so, and very favourable to the plaintiff; that is, that he would certainly have sold the article, if he had received it, at the advance of that day, and not have retained it subject to the contingency of a depression. It is also true, on the other hand, that he must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value. Before we inquire, from the evidence, what was the price of coffee on the day the defendant was bound to deliver this parcel to the plaintiff, we must settle the true meaning or interpretation of the rule, what is intended by the *price* of the article? On the one side it is contended that the plaintiff is entitled to recover so much money from the defendant as on that day would have enabled him to purchase the coffee; to make good the contract, and put into his possession the article the defendant had contracted to deliver to him; in short, to compel against him a specific performance of his contract. We do not inquire whether there would be any thing unjust in this rule—any thing of which one has a right to complain who has broken his engagements. But is it the rule which the law has adopted? Does it not introduce a new rule and a new principle into such cases? It is the price—the *market-price* of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value*—the rate at which the thing is sold. To make a *market* there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put

[Blydenburgh and Burns v. Welsh.]

fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour for instance, under a false rumour, which if true would augment its value, may suspend their sales, or put a price upon it, not according to its value in the *actual* state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value, provided the rumour shall prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages, is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance.

The law does not intend this: it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter.

With this explanation of the rule which prescribes the market price of the article on the day of delivery, we must examine whether the jury in this case have executed it clearly in the verdict which they have rendered. It is conceded by both parties that they have calculated the coffee which the defendant was bound to deliver to the plaintiff on the 14th of April 1825 at 19½ cents a pound. Does the evidence support this calculation or estimate for such coffee, or so large a quantity on that day? Was this the buying and selling price? We feel, as the jury probably did, no inclination to force the testimony in favour of the defendant; on the contrary, his unaccounted for and unaccountable conduct in this affair; the carelessness, to say nothing more harsh of it, with which he disregarded a deliberate, and to him a profitable contract, was calculated to induce a jury to go all allowable lengths against him. The reason he gave for refusing to perform his bargain with the plaintiff, has been given up at the trial, and never had any solid foundation even in his own opinion. The ground taken for his justification or apology here, so far as appears by the evidence, did not occur to him at the time of the transaction, and of course formed no part of his motive or reason for receding from his engagement. Unwilling to impute to Mr Welsh a sordid design, we confess ourselves unable to discover the cause of

[Blydenburgh and Burns v. Welsh.]

his departure from the course it was so obviously his duty to pursue. If such considerations have influenced the jury, and very naturally too, in making up their verdict, we must not allow them to affect our judgment of the law of the case, and the application of it to the evidence. Juries may sometimes yield, honestly, to excitements, which judges must not feel. To correct such errors is a prominent use of the calm review of a case on a motion for a new trial. The question of market value is one so peculiarly proper for the decision of a jury, that we would not oppose ourselves to their opinion upon it, unless where we are assured that they have either mistaken the rule of law, or contradicted the clear purport of the evidence. We inquire then, have the jury erred on this point, and given to the plaintiff a higher rate of damages than he is entitled to; that is, have they estimated the coffee, which was the subject of the contract, at a greater value than it had in the market on the 14th of April 1825? On a careful examination of the testimony of very intelligent witnesses, well acquainted with the subject, we cannot believe that the value of this coffee was, on that day, so high as 19½ cents a pound, or that the plaintiff, had it been duly delivered to him, could have obtained any such price for it. Mr Stacy's quotation of prices to his correspondent in his letter of the 12th, gives no sales or other facts on which this opinion, for it is no more, was founded; nor the quality or quantity to which he applies it; and it is to be recollected too, that Mr Stacy was a seller, and that Mr Linn on this same 12th inst. offered, but could not get 19 cents for Mr Stacy's coffee. As to the day in question, and which, in such a fluctuating market, must be particularly looked to, we have no evidence of value or price, either by actual sales or other data, in relation to coffee on that day.

There was a sudden and considerable excitement in the coffee market on the 7th, founded on circumstances and expectations which were not afterwards confirmed; and no sales were made from that day to the 14th inclusive, which, in our minds, show such an advance as would have raised the value of this coffee to the price at which it has been estimated by the jury. Whatever prices the holders may have asked, no one was willing to give them; but on Tuesday, the 12th, Mr Linn offered any he had at 19 cents, and could get no bid. We forbear to make a more minute examination of the testimony, or to express a more precise opinion upon it, as it may again come under our judicial investigation. It is enough that

[Blydenburgh and Burns v. Welsh.]

we think the jury have so far overrated the value of this coffee, as to support the objection of excessive damages to their verdict. It is not unlikely that they may have not exactly understood what was the meaning of the court in instructing them in the range they might take between the lowest and the highest price, as they might deem the refusal of the defendant to perform his contract to be wilful or inadvertent ; proceeding from an unjust violation of his engagement, or a conscientious, although mistaken view of the obligation. While we then thought, and now think, that the jury might take such matters into their consideration in assessing the damages, we did not intend that they should go out of the limits of the market price, nor take as that price whatever the holders of coffee might choose to ask for it ; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought and sold. It has even grown into a proverb, that a thing is worth what it will bring, not what the caprice or speculating anticipations of its owner may induce him to ask for it.

Being of opinion, on this first reason, that it is well maintained, and that the verdict ought to be set aside on account of the excessiveness of the damages, it is unnecessary to give any opinion on the other reasons filed and argued by the defendant.

We think it is not going out of the path of our duty to suggest that as the right of the plaintiff to a verdict seems to be well established, and the question is only about the amount he should recover, we may recommend a settlement of this matter by the parties, or their counsel or friends ; thus avoiding an expensive, troublesome and unpleasant litigation.

MAGNIAC AND COMPANY V. THOMPSON.

To make a contract void under the 13th Eliz., for fraud against creditors, both parties must concur in the fraud.

The declarations of the debtor are not evidence to defeat the title of the grantor, under a conveyance alleged to be fraudulent.

A contract or conveyance, in consideration of a future marriage, is within the sixth section of the statute of 13 Eliz., if bona fide and without notice of fraud, &c.

Marriage is a consideration as valuable as money, if bona fide, &c.

If a marriage contract is executed, the wife is a purchaser, and the contract is valid though the husband was in debt at the time.

If the contract is executory, she is a creditor till it is performed.

If part executed, she is pro tanto a purchaser, and a creditor for the residue.

The husband has the same right to prefer his wife in completing a settlement pursuant to articles before marriage as he has to prefer any other creditor.

Whether her position is as a purchaser or creditor, her rights are the same as purchasers for money, or creditors by bond.

Her trustee is the purchaser or creditor at law, and she in equity.

If a contract before marriage could be enforced at law or in equity, the voluntary performance by the husband is as valid as if done under a judgment or decree, and is good against creditors who have no lien.

The consideration of marriage being deemed valuable, a court of law will not estimate it in comparison with the settlement, equity may do it.

After the marriage, the marriage articles will not be presumed to have been abandoned by any delay or negligence of the trustee in their execution.

A covenant in the marriage articles by the father of the intended wife, to stand seised to her use, after marriage, of a piece of real estate, does not operate after marriage, to pass the legal estate by the statute of uses, 27 Hen. 8, the use remains executory in the trustee and his heir at law.

Where by the marriage articles the husband was to erect a house and furnish it as he thought fit, an indiscreet expenditure for furniture is not, per se, fraudulent against creditors, unless it is so extravagant as at first blush to indicate a fraudulent motive, the creditors of the husband may take the excess.

Where the sum stipulated by articles before marriage has not been made up, the husband may do it afterwards on the eve of a judgment against him, if done in performance of the articles, or so accepted by the trustee.

Marriage articles are not affected by not being recorded within the time prescribed by the laws of New Jersey..

THIS case was tried on a feigned issue made up by agreement of parties, for the purpose of ascertaining whether John R. Thompson, the defendant, had any means wherewith to pay a debt claimed by the plaintiffs, or means by the property in his marriage settlement, or otherwise, of satisfying a certain judgment in their favour against

[Magniac and Company v. Thompson.]

him. The agreement was made the 3d of June 1830. On the 27th of November 1827, the plaintiffs obtained a judgment in this court against the defendant for 22,191 dollars, an action of debt was brought upon it to April 1829, in the circuit court of New Jersey, and judgment confessed the 1st of October 1829 for 24,652 dollars, an alias capias ad satisfaciendum was issued on the judgment to April 1830, on which the defendant was committed, of this judgment about 12,000 dollars remained due at the time of the agreement.

The debt to the plaintiffs was contracted under the following circumstances. The defendant had resided some years at Canton, he left it in March 1825 to return to the United States, leaving Mr Rodney Fisher his agent, with full powers to transact business for him, having previously been introduced to the plaintiffs, merchants residing in Canton, by the defendant, as his agent. In November 1825, Edward Thompson, the father of defendant, had two ships in Canton, for which he could not procure cargoes for the want of funds or credit, Mr Fisher, as agent for defendant, made up an invoice of goods to the amount of 42,000 dollars, on which he took up from the plaintiffs 30,000 dollars on the 22d of November 1825; on the 2d of December 1825 he made up another invoice of 44,000 dollars, on which plaintiff advanced 33,000 dollars, the goods were pledged to the plaintiffs, and shipped on board of the vessels of Edward Thompson, the defendant had no interest in the transaction except his commissions. The goods arrived at this place, and were sold at a loss of 46,000 dollars on the invoice. The judgment of the plaintiffs was for the balance of their advances on the two invoices.

The defendant returned to this place in June 1825, shortly after which he paid his addresses to Miss Stockton, in July an engagement of marriage took place between them, and between that and September proposals of a settlement on her were made by him, and before the agreement was put in writing, had begun to erect a house on the lot therein mentioned. On the 19th of December 1825, articles of agreement and covenant were made between the defendant, Miss Stockton, and her father Richard Stockton, reciting the intended marriage, and the previous promise of Mr Stockton to give his daughter a lot of four or five acres near Princeton, "on which lot the said J. R. Thompson has begun to build a house." It was then stipulated, that from and after the marriage, Mr Stockton should stand seised of the lot and all buildings to be erected thereon, in trust, to permit the parties during their joint lives to reside thereon if

[Magniac and Company v. Thompson.]

they think proper, if not, then the rents to be paid to his daughter during their joint lives.

If Thompson should survive her and have issue, he to occupy the lot and house, or to receive the rents for the maintenance and support of himself and family ; after his death, in trust for the children of the marriage as tenants in common, if there should be no children then, on the death of either party, in trust for the survivor.

Thompson stipulated that if the marriage took effect, and in consideration thereof, he would, with convenient speed, build and furnish said house in a suitable manner as he shall judge fit and proper, which, with all erections, improvements, furniture and additions shall be subject to said trusts, so far as they are applicable to each species of property, and will, in one year after the marriage, place out on good security 40,000 dollars, and hand over and assign the evidences thereof to Mr Stockton, who shall hold the same in trust ; to receive the interest for her use during their joint lives, and her receipt to be good ; if she dies leaving issue, to pay the same to Thompson for his and their support without account, and after his death to the children in equal parts ; if she survives and has issue, then on the same trusts for her ; if either dies without issue, then in trust for the survivor. Thompson had permission to act as the agent, and to change the securities from time to time. It was mutually agreed that the trustee should not be held guilty of a breach of trust for not acting, unless expressly requested to do so by one of the parties, and not to be held answerable as trustee, unless for acts of wilful neglect or misconduct. Vide 7 Pet. 349. The marriage took place the 28th of December 1825. Thompson proceeded to finish the house, which cost about 13,000 dollars, and furnished it, which cost about 5000 dollars, but made no investments on security, or other provision for the 40,000 dollars, during the life of Mr Stockton, who appears to have taken no measures to compel the completion of the settlement. After his death, Thompson, on the 29th of September 1829, indorsed to captain Stockton, as trustee for Mrs Thompson, on account of the 40,000 dollars, one note for 5000 dollars, which was good, and another of one Morris for 4500 dollars, which was considered doubtful, nothing more was paid on that account.

The agreement was proved the 5th of April 1830, and recorded the 22d of May 1830.

It appears that on his return from Canton, Mr Thompson was worth about 90,000 dollars, and owed but a small amount of debts ;

[Magniac and Company v. Thompson.]

he was under heavy responsibilities for his father, by whom he lost a very large sum.

From the statements produced and verified at the trial, the amount of what Mr Thompson was worth in 1825, was accounted for, and no proof was given that he had concealed, secreted, or kept any thing for his own use, he appeared to be in possession of no property, real or personal, or to have any control over any. The cause turned on the validity and effect of the marriage contract, the conduct of the parties to it, and the mode of its execution.

The insolvency of Edward Thompson was publicly known on the 19th of November 1825. On the 19th of December 1825, previous to the drawing up of the articles, Thompson made a written statement directed to Mr Stockton, in substance as follows.

"I have no personal debts except to a small amount in common course of business and living. I am surety for my father to S. & L. in a respondentia bond for 200,000 dollars, if the goods sell reasonably well there can be no loss, the freight premiums on dollars and commissions tend to enhance the security, &c., there can therefore be no demand on me. On no fair principle can the loss be more than 20,000 dollars and I consider myself worth that amount, if not more, in addition to the sum proposed to be settled." Signed "J. R. T., December 19th, 1825." Indorsed. "Statement made to the trustee by J. R. T. as the basis of the settlement, and upon which it was made. R. Stockton." Vide 7 Peters 353.

Mr Joseph R. Ingersoll, for plaintiff.

The plaintiff is a meritorious creditor, as to whom the marriage settlement is void for fraud, on account of its having been concealed till after the judgment in New Jersey, and not having been carried into effect substantially.

Any conveyance or gift after marriage is void, per se, if the husband was indebted at the time, 3 Johns. Ch. 492 ; as to subsequent debts the presumption is in favour of the settlement; 3 Johns. Ch. 502 ; subsequent creditors may avoid it by showing debts existing before, due to other creditors. 12 Serg. & Rawle 448. An antenuptial settlement may be good if it is fair, and the bulk of the husband's property is subject to his debts, his mere indebtedness will not invalidate it, and if there is no fraud, 1 Rep. on Prop. 298, it will be enforced in equity, so far as it is consistent with the policy and principles of law, 2 Kent 144 ; provided it be reasonable and not extra-

[Magnaie and Company v. Thompson.]

vagant, Reeve's D. R. 176. A man in debt may make a valid sale of his property, if it is fair and for good and adequate consideration bona fide and not to withdraw it from his creditors. So he may settle it before marriage, but if the settlement is disproportionate to his means, it is suspicious, and may be held fraudulent as to creditors. 12 Serg. & Rawle 456; 8 Wheat. 238; 2 Kent 146.

At the time of this settlement Thompson was in fact worth nothing, the failure of his father was known, and he then estimated his loss at 20,000 dollars, leaving himself worth 60,000 dollars, the settlement required 58,000 dollars, which presents strong ground of suspicion of a design to defraud his creditors, Vide 17 Ves. 263; 1 Rop. 296, 298. Thompson was to have the control of the fund, to appear as the owner with a power of substituting and changing the investment, equivalent to a power of revocation, which is a strong badge of fraud. He had begun to erect the house before the articles were executed, and with the permission of Mr Stockton, which would give the creditors a right to take it as Thompson's, on the same principle that permitting a party to make improvements, shall prevent the owner from disturbing him in their enjoyment, 2 Atk. 83; 1 Eq. C. Ab. 326, pl. 10; 2 Eq. C. Ab. 532, pl. 3; or the acceptance of rent which binds the party to confirm a lease. 3 Atk. 692.

The settlement was never acknowledged, it was proved but not recorded till two days before the *capias ad satisfaciendum* issued against Thompson; on this account it was void by the laws of New Jersey, which declares all deeds and conveyances to be void as against subsequent judgment creditors unless acknowledged and recorded in fifteen days after their execution. Rev. Laws N. J. 747. As the contract was not a gift, it operated as a deed to Thompson as a purchaser of the lot, investing him with the title so as to make it liable to his creditors if the contract was not recorded so as to give notice of the trust. This principle is settled in 1 Dess. 401; 2 Dess. 254; in which cases, the debt was contracted after the settlement was recorded, yet having been recorded after the time required by law, the property settled was held to be subject to the debt.

In this case the settlement seems to have been abandoned, it remained pocketed till Thompson was arrested on a *capias ad satisfaciendum*, he remained in possession of the house as apparent owner, no application was made to him to make any investment of the 40,000 dollars or any part, and he did not offer to make any till the 29th of September 1829, the day before the judgment, when he delivered

[Magniac and Company v. Thompson.]

over the two notes which he had till then retained. The contract, though in form calling for a settlement, has never been tested by the parties as having any substantial efficacy as between the parties, and their conduct has precluded them from now setting it up against the plaintiffs. Every thing that has been done towards its execution has been since the marriage and the pressure of the plaintiffs' debt; so that in effect and substance it is a post-nuptial contract, which is not good if the consideration does not have a reasonable proportion to the settlement. 2 Kent 145, 146. It is under these circumstances a voluntary settlement after marriage, which is void against previous creditors. 4 Wash. 137. To complete it, required more than Thompson was worth at the time; his father's insolvency was well known, and it was as well known that the settlement could not be completed but at the expense and with the funds of his creditors. A party claiming under such an agreement, which necessarily withdraws property of a debtor from his creditors, ought to be held to all the forms and rules of law in carrying it into execution; it was to have been completed in one year from the marriage, but was abandoned, when Thompson's affairs were wound up and found desperate. The parties could not revive it in 1829, if the delivery of the notes was intended to apply to it, it was, however, as a mere colour, for the agreement was not recorded till seven months afterwards.

Though ante-nuptial contracts are highly favoured in courts of law and equity, they ought not to be so at the expense of creditors, especially when, as in this case, it was evident that it could not be completed by Thompson's own means. It must have been ascertained before the house was finished and furnished, that the 40,000 dollars could not be invested for the purposes of the trust; the expenditure of 18,000 dollars for the establishment, without any income to support it, was incompatible with the situation of Thompson, it was extravagant, and indicated an intention not consistent with good faith towards creditors. As Thompson was by the agreement to have the use of the house and furniture, the expenditure of 5000 dollars on the latter was, per se, a fraud on creditors; an insolvent man will not be permitted to apply the money of his creditors for the purposes of useless ostentation, or to gratify the pride of his family.

Mr Joseph P. Norris and Mr Binney, for defendant.

The burthen of proving fraud is on the plaintiffs. If there was

[Magniac and Company v. Thompson.]

any fraud, the parties interested in this suit are not implicated in it, the settlement was agreed on when Mr Thompson believed he was worth 90,000 dollars, there has been no concealment of property, or any conduct of his which indicates any actual or intended fraud at that time, but the contrary appears by a reference to the facts honestly believed at that time to exist. The settlement is not contrary to law, it was a covenant to stand seised to uses, which is completely binding on its execution without recording, 4 Pet. 82; and not a conveyance at common law. The time of investing the portion was not of the essence of the contract, it was good whenever made to carry the contract into effect. An ante-nuptial contract is good against husband and creditors, 1 Rep. on Prop. 297; where the consideration of marriage intervenes, the obligation is perfect and binding; 2 Rep. on Prop. 33; 17 Ves. 262; though the party is in debt, it is good against creditors, if there is no legal or actual fraud, and made as a bona fide performance of a moral obligation, its specific performance will be decreed in equity; 3 Johns. Ch. 494, and cases cited; 2 Kent 145; 3 Johns. Ch. 554; 2 Dess. 264; who will go further to protect the wife than the husband? 2 P. Wms 700; it will not be avoided by a subsequent act of bankruptcy; Ath. on Mar. Set. 373; 1 Atk. 158, 189; 2 Atk. 445; Cro. Jac. 158; nor will fraud be presumed without manifest proof. 2 D. C. D. 616; 2 Ch. Cas. 85, 114.

The title was in Mr Stockton, who was not bound to convey, but was to hold the property for the purposes of the marriage, on a trust not executed by the statute of uses, but which remained executory from its nature. 1 Vent. 194. If the settlement was not good, the title to the lot did not revert to Thompson, it was good between the parties, the plaintiffs might have levied on it, as well as on the house and furniture under the judgment in New Jersey, or might have proceeded in chancery. In the latter case, the defendant would have had the benefit of his oath, in this suit he cannot be heard, and therefore the plaintiff ought to be held to clear proof of fraud in fact. From the terms of the marriage articles, taken with reference to the then situation of Mr Thompson, no fraud is imputable in law, he had no knowledge of debts contracted in Canton only a month before; he was not about embarking in any hazardous speculation, as in the case of Thompson v. Dougherty, 12 Serg. & Rawle 448, &c., but was about to retire from business on a competency, his responsibility on the inchoate agreement for a settlement, and the engagement of

[Magniac and Company v. Thompson.]

marriage attached three months before his agent contracted a debt to plaintiffs. The bona fides of that contract cannot be questioned, for though he had means then in his hands, he did not apply them to the investment of the 40,000 dollars, but suffered them to go to his father's debts. That there was a verbal contract previous to the written one, is evident from his having begun the erection of a house before it was signed. While Mr Stockton had no security for the 40,000 dollars, the plaintiff had on an advance of 63,000 dollars a pledge of invoices amounting to 86,000, and of the money advanced to Mr Fisher, Thompson received nothing. Under such circumstances there is no legal presumption or evidence of fraud intended by him, still less by Mr and Miss Stockton; it is indeed a singular imputation of a design to defraud creditors, when none of the parties had a knowledge that there were creditors.

When Thompson promised to make the settlement, in the summer of 1825, he was not in debt, such promises were binding before the statute of frauds, though not in writing, and equity would have decreed a specific performance, such agreements are always made before they are reduced to writing, the good faith of which is shown by giving time to complete the settlement, Vide 8 Wheat. 238, &c. Marriage is a consideration higher than any other known to the law, 2 Eq. Cas. Ab. 585, it cannot be measured, nothing in exchange for it is excessive or extravagant (unless so gross as to be evidence of fraud), because it cannot be restored or compensation made. The man becomes a debtor to the trustee of his intended wife and to her, either of whom may apply to equity to enforce the contract, without any reference to the proportion between the wife's portion and the sum to be settled. This may be necessary in post-nuptial contracts, but though the wife is to bring no portion, an ante-nuptial contract is good, *per se*, against purchasers and creditors, or if made after marriage, in pursuance of an agreement before, whether the purchaser had notice or not, unless he has the legal estate, Atherly 125, 128, 149, 151; 1 P. Wms 277, or the creditor had a lien.

Where a father held land on a secret trust, and conveyed it to his daughter on her marriage, the husband, having no notice of the trust before marriage, held it discharged therefrom, 2 R. R. 105; marriage is a purchase of the most favoured kind, 1 Vent. 194; 1 Ch. Cas. 99; not on account of the wife's portion, but the marriage, 1 Atk. 158, 190; contracts in consideration of marriage are equally protected, 2 Ves. Sen. 304, 8; Amb. 121; 5 Ves. 878; no instance

[Magniac and Company v. Thompson.]

is known where a settlement in consideration of marriage has been set aside, unless the intended wife was a party to the fraud; 2 Dick. 504, 506; 17 Ves. 263, 268; marriage is a sufficient consideration on which to set aside a former voluntary settlement, or deed; Cowp. 712; 6 Ves. 752. Claims of creditors, unless by judgment, are no objection to the execution of a marriage contract or articles, for though voluntary in their creation, they are the inducement to the marriage, and good against antecedent creditors, unless the wife knew that bounty to her was a fraud on them. Pr. Ch. 377, 402, 405, and cases cited. Wherever the husband can make a valid sale, he can make a valid settlement without any money consideration, 1 Swanst. 319, and where the contract is executory, she is the most favoured creditor, and will be preferred unless she has done something to postpone herself. No act of the trustee in neglecting to have the settlement completed could affect her, as equity would protect her rights; if the trustee should abandon or surrender the fund agreed to be settled, equity would make the person who held it a trustee for the wife, or if she should consent to it, equity would protect it for the issue of the marriage, who are deemed parties to the contract as purchasers under it.

In this case there could be no abandonment by the husband, the trustee or the wife, there was no necessity of recording the articles because no one could purchase without notice, while Thompson and wife were in possession, which is notice of title. If the omission to record had any effect, it was not to vest the property in Thompson, so as to make it liable to his debts, but to expose it to the creditors of Mr Stockton, who held the legal title. Thompson was not made the agent to manage the fund by the agreement, he could act as such only by the permission and under the control of the trustee. In marriage settlements, the possession of the property settled must be joint, if consistent with their terms, such possession is no badge of fraud. He was a debtor under the marriage contract, and had a right to make payment in any manner agreed upon to comply with it; the house was to be suitably furnished, so as he might deem fit, the want of an inventory did not make it fraudulent; Atherly 173; 6 East 281; 17 Ves. 272, the articles were executory, the use never was executed; they are considered as instructions by which to draw the formal settlement, and may be executed *cy pres*. Atherly 92, 106. On a covenant to stand seised to the uses of a marriage, they are executory till the uses are well raised by a deed.

[Magniac and Company v. Thompson.]

The amount expended on furniture does not affect the contract on the ground of fraud, if it is extravagant, the surplus is liable to execution by creditors.

As the contract remained executory till the settlement was executed, Thompson might make the investments at any time on account of the 40,000 dollars in payment of the debt he had contracted, his transfer of the securities in 1829, was in part execution of the contract, which was no fraud on creditors, because he had a right to pay the debt due on the marriage contract in preference to the debt to the plaintiff. There is no evidence that these securities were transferred collusively or colourably, with any fraudulent purpose.

Mr C. J. Ingersoll, for plaintiffs.

The defendant stands in the position of an applicant for the benefit of the insolvent laws, who must be able to take the oath required by the act of congress; 1 Story 715; from the nature of the issue in this case, he is bound to prove affirmatively that he has no property, by accounting for all the property which has been traced to his hands, which he has not done, and he cannot honestly take the oath prescribed by that law. He stands here on a presumption of fraud which he must rebut, the plaintiffs complain of fraud by the concealment and abstraction of property which they may prove by circumstances or negatives pregnant. It is admitted that Thompson has applied 27,500 dollars to the marriage contract, of which he has the use, which is equal to an income to the amount of the interest of that sum; the meaning and effect of the settlement, so far as executed is, that his property has been given to his wife's trustee to keep for him, and prevent the plaintiffs from recovering their debt, under cover of the agreement which had been abandoned.

Admitting marriage to be a consideration however high, the contract may be impeached for fraud on a prior creditor, as the plaintiff was in this case, and the adequacy of the settlement will be inquired into; in the case cited from 1 P. W. 277, the judgment was after the articles, and the chancellor said that the consideration paid must be somewhat adequate to the thing purchased, or a judgment between the articles and the deed would be let in. Ibid. 282, 283. A purchase by marriage is in all respects on the same footing as for money, so is a creditor by marriage articles; marriage is but a civil contract between the parties, and where third persons are concerned, is examined and construed like other contracts, and will not be suf-

[Magniac and Company v. Thompson.]

ferred to be available to withdraw a debtor's property from the reach of his creditors, or to defeat a trust under which he holds the property of others. The case cited from 2 Rolle 105 was not finally decided, it was adjourned; Ibid. 116; in the case from 1 Ventr. 194, and 1 C. C. 99, no question concerning creditors arose, the conveyances in consideration of marriage were held not to be voluntary, and so fraudulent; the case in 1 Ves. Sen. 304, goes no further than to put a settlement after marriage, in consideration of a portion paid, on the same footing as if made before; so of the cases referred to by Atherly 28, 31, 39, 81, 160, 301; but the case in 6 East 257, 280, shows that the consideration of a post-nuptial settlement, will be compared with the sum paid by the wife, and if the latter was inadequate, would be set aside on account of abstracting the husband's property from his creditors, and a new trial was directed for the purpose of ascertaining the state of the husband's debts. Ibid. 282, 283.

The law is settled in this state, that though a deed is for a good and valuable consideration between the parties, it is fraudulent in law against existing creditors, 1 Rawle 353. The law respecting marriage settlements is the same here as in England; yet where a husband entered into articles with trustees to secure to his wife a legacy left her by her grandmother, which he received, but did not execute a mortgage till he was insolvent, and soon after declared a bankrupt; the mortgage was held void, though the husband was solvent when he made the articles. 3 Dall. 304. Indebtedness at the time is the true criterion of legal fraud, where the settlement is voluntary or for an inadequate consideration, 8 Wheat. 242; and the cases referred to are full to the point, that no settlement on a family is good against previous creditors. S. P., 11 Wheat. 213, 214. The supreme court lay down the law to be, that *valuable* must also be an *adequate* consideration. Sextin v. Wheaton, 4 Wheat. 507. In this case the inadequacy is apparent, the completion of the settlement would require more than Thompson was worth, according to his own statement previous to the articles; he said he was worth 20,000 dollars more than the sum to be settled, if his losses did not exceed 20,000 dollars. Now the sum to be settled was 40,000 dollars, the house cost 13,000 dollars, the furniture 5,000, absorbing his whole surplus excepting 2,000, according to the statement which was the basis of the settlement; besides, there was notice of Thompson being surety for an insolvent to the amount of

[Magniac and Company v. Thompson.]

200,000, this was clear proof that it was intended to settle his whole estate, and as the fact turned out, the settlement, as partially made, has absorbed his whole property. This taints the contract strongly with actual fraud, but as a badge of fraud in law, it is inherent in the contract itself as matter of law ; the fact that a debtor conveys or settles his whole estate, makes it fraudulent, per se, against creditors ; so are all the authorities in law and equity, from Twine's case, 3 Coke 80, to Cathcart v. Robinson, 5 Pet. 281, however valuable the consideration may be if the purchaser knows of the existence of the debt.

It was not material whether Richard Stockton was a party to the fraud, all the parties knew of the failure of Edward Thompson before the contract, and the consequent insolvency of defendant ; yet by the terms of this agreement, he was at liberty to build such a house and to furnish it as he pleased, to be the agent of the trustee, with uncontrolled power to change the securities at his pleasure, which are all strong badges of fraud.

The legal effect of the covenant of Richard Stockton, to stand seised to the uses of the agreement, was a conveyance of the house, lot and furniture to Thompson and wife, as a use executed on the marriage by the statute of uses. 27 H. 8 ; 2 Ruff. 227.

The extravagant expenditure for furniture is, in itself, a fraud on creditors, it was not suited to Thompson's condition, and was made after his known insolvency and inability to complete the settlement.

The marriage contract was a mere cover under which to conceal the property of Thompson, the first attempt to make any provision for an investment was the delivery of the securities to captain Stockton, on the day before the confession of the judgment in New Jersey, which was a fraud, per se, on the plaintiffs.

There was no delivery of the agreement, which never took effect in law, no act of the parties to give it notoriety ; it was a secret conveyance, and void, Twine's Case, 3 Co. 81 ; there was no recognition of its existence as a binding contract in the lifetime of the original trustee, and no act of the parties by which the public could judge of their true situation.

I am aware that courts in England have gone great lengths in supporting marriage settlements, they have indeed adopted principles which protect concubines as well as wives against creditors ; but they have grown out of the corruption of manners there, and have not been sanctioned here. The rules which protect creditors against

[Magniac and Company v. Thompson.]

the fraudulent acts of their debtors, have been broken down, and men in debt have been permitted to provide for their families by nuptial contracts, made under circumstances which would invalidate a conveyance for any other consideration. But these decisions are not founded on the principles of the common law, and the affirmative statutes of 13 and 27 Eliz., as adopted in this country, which repudiate a contract like the present, and treated as it has been by the parties, as fraudulent in fact and by the policy of the law.

BALDWIN, J. charged the jury.

The real parties to this suit are the plaintiffs and Mrs Thompson, and the real question between them is, whether the marriage contract was valid, if it was, then Mr Thompson had a right to apply his property towards its fulfilment, and it is lawfully held by the trustees of Mrs Thompson. If the contract is not valid, then Mr Thompson is in law deemed to be the legal owner in trust for his creditors, not because the marriage contract is not binding on him, but because his indebtedness at the time put it out of his power to divest himself of property to the injury of his creditors. It appears that the plaintiffs are the only creditors of Mr Thompson, the existence of the debt is proved by Mr Fisher, and the judgments confessed by Thompson, which are conclusive against him as to its existence and amount; they are also legal evidence to affect the settlement, by showing the indebtedness of Mr Thompson at the time. *Hinde v. Longworth*, 11 Wheat. 210. No evidence has been offered to impeach the fairness of the debt, and you will take it as proved. The case must turn on the validity of the marriage contract, which is good as between the parties and as to all the world, unless it is liable to impeachment for fraud in fact or fraud in law. As to creditors, fraud in fact, or actual fraud, consists in an intention to injure, defraud, delay or prevent them from recovering their just debts, by any contract, gift, deed, settlement or agreement, withdrawing or attempting to withdraw the property of a debtor from the reach of his creditors. The English statute of 13 Eliz., ch. 5, declares all such acts null and void as to creditors, this statute is in affirmance of the common law, is in force in this state and New Jersey, and you will consider it as binding as a law of the state. Proof of fraud need not be express, it may be inferred from circumstances, but ought not to be presumed without either, a jury ought to be satisfied from facts that there was a dishonest intention, and not to infer

[Magniac and Company v. Thompson.]

fraud merely because they have doubts of the fairness of the transaction. From the conduct and situation of the parties, and the effects intended to be produced by the act, something should be made to appear inconsistent with integrity, so as to admit no reasonable interpretation but meditated fraud. 4 Peters 295, 297. Both parties to the alleged act of fraud must concur in the illegal design, the debtor may lawfully sell his property, or prefer one creditor to another, with the direct intention of defrauding other creditors, but unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is valid, 8 Wheat. 238, &c., against other creditors or purchasers who may be injured by the transaction. The admissions or declarations of the debtor, as to the object intended to be effected, are evidence to contradict his answer to a bill brought to annul the act as fraudulent, but not to affect the parties claiming under it, or to have a bearing on the whole case; 2 Pet. 119, 120; 2 Halst. 173, 174; you must therefore have evidence to affect Mrs Thompson and her trustee Mr Richard Stockton with fraud, in participating and concurring in the fraudulent intention, before you can pronounce this marriage contract void for actual fraud.

The facts of this case, which are not complicated, are for your consideration, they seem more satisfactory than are usual in such cases, and we think proper to say, that in our opinion an inference of intention as fraud, would be a very severe comment on the conduct of the parties; it is however for you to decide, and if you think there was intentional fraud in both parties, you will find for plaintiffs. You are to decide another matter of fact, whether Mr Thompson has concealed or has in his possession any part of the property he owned in 1825, other than what has been invested in the house and furniture and the securities in the hands of captain Stockton, in doing which, you will discriminate between the deliberate design to defraud by secreting property for his own use, and losses incurred by casualties and want of prudence or discretion. This question depends on what he has in his actual possession or control, not what he ought to have had, what he has disposed of for any other use than his own, or what has been applied to the marriage contract, which is a subject of distinct consideration. The next and most important question is, whether the marriage contract is fraudulent in law, and for that reason void as against the plaintiff, that is, though the intention of the parties was honest, the policy of the law forbids

[Magniac and Company v. Thompson.]

the execution of the contract, and takes from it all legal efficacy as to the creditors of Thompson.

By the sixth section of the statute of 13th Eliz. it is provided, that it shall not extend to any interest in land or goods and chattels, made on good consideration, bona fide, lawfully conveyed or assured to any person, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such fraud, covin or collusion.

The words of the law require that both parties must concur in the fraud, so it has been held for two hundred and sixty years. There are in law two kinds of consideration, "good," which is natural love and affection, and "valuable," which is money or marriage; the word "good" in the sixth section has always been held both in courts of law and equity to mean a valuable consideration.

Hence the law has been expounded to embrace three kinds of conveyances.

1. Those made with a fraudulent intent in both parties, which are declared void as well by the enacting part of the law as by the exemption from the saving in the sixth section, without regard to the consideration.

2. Voluntary conveyances made for good consideration, without fraud in fact, but as they tend to defraud creditors if they vest the property, the policy of the law makes them void for legal fraud, which it imputes to them on account of their tendency, which is deemed equivalent to actual fraud.

3. Conveyances for valuable consideration, bona fide, without notice of any fraud or covin by the person receiving the conveyance, which are excepted out of the statute, are valid at common law to pass the property conveyed, and entitle the purchasers to the protection of all courts.

If you should find that this contract does not come within the first class, it cannot come within the second, for if made in contemplation of marriage, the intended wife is on the footing of a creditor or a purchaser for money, and not of a voluntary grantee for the mere consideration of love and affection, or as a volunteer. There is a marked difference between a provision for a wife and children before and after marriage, where there is no portion or money paid as the consideration; in the first, the consideration is as valuable as the debt due a creditor, or the money paid by a purchaser, in the latter it is merely voluntary. There is indeed a moral obligation to pro-

[Magniac and Company v. Thompson.]

vide for the support and comfort of a family, but it must yield to the higher legal obligation towards those who have claims on the property of their debtors. As between creditors and volunteers a man must be just before he is generous. But where conflicting claims arise between creditor and creditor, purchaser and purchaser, or purchaser and creditor, the first inquiry is, whether the party claiming the debt or the property purchased has such a right as is recognised by a court of law; the next is whether such right has been acquired under such circumstances as will annul or modify it in a court of chancery by the established principles of equity. As between debtor and creditor the latter has a right to as much of the debtor's property as will pay his debt, but the debtor may prefer one creditor to another, or give all his property to one, and it is neither fraud in fact or law without covin or collusion. He may make a sale of his whole estate, turn it into money, and distribute it at pleasure among his creditors, and the bona fide purchaser will hold it against all creditors who have not previous liens, 8 Wheat. 242; 11 Wheat. 213, 214. These principles cannot be shaken.

A contract in consideration of a future marriage creates a legal and equitable obligation to perform it in good faith; if the contract is executed, the parties become purchasers, if it remains executory till after marriage, they become creditors after its consummation, or assume pro tanto the character and rights of both, if executed only in part, entitled to the protection of all courts in enjoying what is granted, and their aid in enforcing performance of what remains to be done. And if either party voluntarily perform what a court would compel to be done, it would be as valid as if done by its judgment or decree, or as if the execution had been completed on the date of the contract. The law is express in referring to the time of the conveyance and assurance, and embraces not only perfect grants and gifts but "any estate or interest in lands, goods and chattels, made, conveyed or assured." On these principles it is the opinion of the court that the evidence brings the marriage contract within the sixth section of the statute, unless you shall find it not made in good faith, or with notice of fraud in Thompson brought home to his intended wife, and that Thompson actually entered into it with a fraudulent, covinous or collusive intention.

If you do not so find it, then Mr Richard Stockton is considered, at law, a bona fide purchaser for a valuable consideration, without notice so far as the contract has been executed by Thompson, and his

[Magniac and Company v. Thompson.]

creditor for what is executory. Mrs Thompson has the same character in equity, and captain Stockton is now standing in all respects in the situation of his father. The case then is a contest between captain Stockton, the legal, and Mrs Thompson the equitable purchaser of the house, furniture and securities, by the contract and the marriage, of the lot as her marriage portion, and the plaintiffs the sole creditor of Mr Thompson. Thus they stood at the commencement of the suit, and as creditors at the time of the contract and confirmation of the marriage, Mr Stockton and Mrs Thompson having performed their stipulations had a perfect right to call on Thompson at law and in equity to perform his. As a purchaser Mrs Thompson is one of the most favoured class, the consideration she has given is as valuable as money, it need not be considered as more so; as a money purchaser of property, a conveyance before marriage by her intended husband would be as valid though he was in debt as if he was not. If he held the legal title the interest would vest by his deed, though he held it in trust for others, as fully and completely as if Thompson had a right as perfect in equity as at law, provided she had no notice of the trust. This is an universal rule, a principle never questioned, and protects all bona fide purchasers for valuable consideration without notice before the money paid or the condition of the grant performed; it applies to Mrs Thompson not as a privileged purchaser, but as purchaser from one who has the legal title, subject to an unknown trust for the use of a third person. Placing the plaintiff in the situation of a cestui que trust, and he cannot be placed in a better one, it is a strong one against him; the debt to him was contracted but a few days before the date of the marriage articles, and in a part of the world so remote as to exclude the possibility of notice to any of the parties, which differs this from the common cases of a trustee conveying the legal estate to the injury of cestui que trust, where the trust is necessarily known to the trustee, and he is guilty of direct fraud.

Hard as the application of this principle may be, it is not relaxed even in favour of the widow or orphan who has been defrauded by their trustee selling what is not his own; a loss must fall on one of two innocent sufferers whose claims may be supposed equal in justice and equity, in such case the law leaves the property with the one, who has acquired the legal title by fair purchase, in good faith and without notice. A creditor of a fraudulent debtor who settles on his intended wife property which he is bound to apply to the

[Magniac and Company v. Thompson.]

payment of his debts, is entitled to no more favour, than any other person whose property is unjustly conveyed by his trustee to pay his own debts, to rob one family to save another, or secure a provision for an expected one of his own. The creditor can be no where more favoured than the infant, the ward, the widow, or the orphan, whose property is held in trust without lien or security, and subject to a sale by the trustee. The creditors of a deceased debtor have the same rights as those of a living one, yet if the executor sells the personal property to pay his own debt, a purchaser without notice or collusion will hold it even in equity. This is as much a violation of moral honesty and breach of faith, as to settle it on an intended wife, to whom he was under as high an obligation to pay the consideration of the marriage contract, as a bond given for money lent, or property purchased. (Vide 7 Pet. 268.)

The consideration of this contract is both marriage and property, the value of the first cannot be, and of the last has not been ascertained in dollars; but at law, the mere inadequacy of consideration is no ground for declaring a conveyance of real or personal property void, if there is any consideration, the conveyance is valid at law; the amount cannot be inquired into as respects the grantor, his creditors or subsequent purchasers, in the absence of actual and legal fraud in the grantor or notice of it to the grantee. The only resort of parties who complain of equitable fraud, or other circumstances which would invalidate it in equity, is to those courts; they only can decide upon the adequacy of a pecuniary fund, or the equality of marriage to a given sum of money or value of property, under the circumstances of the case.

Cases may exist where equity would compare and estimate them for the relief of a creditor, a purchaser, or perhaps the party, in a strong and clear case of injustice; but we know of no instance where it has set aside a purchase for valuable consideration on a marriage contract, when made bona fide and without notice of fraud or defect of title. Those claiming under them have ever been the peculiar favourites of courts of equity, and their rights can never be disturbed unless in extreme cases, none have yet arisen, when they do arise they will be exceptions to a rule which is as yet without any, and growing out of the necessity of the case.

In the present case we perceive nothing which gives it any unusual features, from the evidence it appears, that at the time of the contract of marriage, Mr Thompson was abundantly able to make

[Magniac and Company v. Thompson.]

the stipulated settlement and pay all his debts. His inability has been accounted for by heavy and unexpected losses on investments made by his agent in good faith; without any ground for the imputation of dishonesty or imprudence in Thompson, his situation is such, that his wife must lose 30,000 dollars of her settlement, or his only creditor lose 12,000 dollars of his debt. Admitting their equities to be equal, she has a legal advantage which no court can take from her; unless her conduct can be impeached for fraud, actual or legal, it would be as unjust as illegal and inequitable, to visit alone on her the consequences of her husband's misfortunes.

Considering Mrs Thompson therefore as a purchaser under the marriage articles, we are decidedly of opinion, that there is no legal fraud attending the transaction which would invalidate it in a court of law, or any matter given in evidence which would impair its obligation in a court of equity.

If she cannot be viewed as the purchaser of the property contracted to be invested for her use, she is certainly a fair and honest creditor from the time of executing the contract, if not from the time of the proposed settlement in August preceding, and after the engagement of marriage was made.

If however she was a creditor on the 19th of December, Thompson had a right to prefer her in preference to any other creditor, to the extent of his whole property whenever he could realize or reduce it to possession. The mere priority of plaintiffs' debt, in point of time, could not affect such preference from being effectual, nor could the previous authority to Mr Fisher to contract the debt, affect the inchoate rights of Mrs Thompson by the engagement and proposed settlement in the summer of 1825, which you may fairly infer from the agreement was in a course of execution, by Thompson having begun to build on the lot, of which Mr Stockton was to stand seised in trust, before the date of the articles.

If the settlement had taken Thompson's whole estate, and the certain consequences of its execution, or the intention of the parties had been to exclude the plaintiff from the payment of his debt under cover of the agreement, we would give him relief on the equity side of the court, but the present state of things has not resulted from the effect of the agreement, or the intention of the parties, unexpected losses alone have led to it, the consequences of which are these. The plaintiffs' debt was 63,000 dollars, of which there is now due of principal and interest 12,000 dollars; the debt of Mrs

[Magniac and Company v. Thompson.]

Thompson estimating the house and furniture at 18,000 dollars was 58,000, of which there is now due 35,000 dollars if Morris's debt is not good, or if good, 30,500 with interest from December 1825. Though this inequality of loss would be of no importance at law, it would be a powerful circumstance in equity, on an application by the plaintiff for relief, and the present case would be very different if the whole 40,000 dollars had been invested. This view of the merits of the case suffices for the decision of the points directly at issue, without adverting to others which have been made as to contracts for settlements made after marriage; the nature of the issue required us to so view the case. It has been urged by the plaintiffs' counsel, that there has been no delivery of the contract in the present case, but the evidence is sufficient in law to prove it, the building and furnishing the house tend strongly to prove it satisfactorily; the contract is also said to have been abandoned, this is not to be presumed, and we think the facts in evidence do not amount to proof of abandonment by Mrs Thompson, or any acts done by her which could impair her rights. The omission of the trustee to enforce the payment of the money, and to record the deed, is no waiver by her, and any acts done by him inconsistent with the agreement, would not impair the legal validity of her rights; the acts of a parent are never so construed, unless clearly intended to be so; the law as to these objections is well settled in *Carver v. Astor*, 4 Peters 28, 82, 93 to 99.

We have been requested to charge you, that in point of law the covenant on the part of Mr Richard Stockton to stand seised to uses, operated as an immediate conveyance to his daughter before marriage, and that by the marriage, Thompson became the owner of the furniture in his own right, and had the exclusive use of the house and lot unincumbered with the trusts of the agreement. But inasmuch as by the covenant contained in that agreement, Mr Stockton was not to stand seised to the use of his daughter till after marriage, the court instruct you as matter of law, that the marriage articles do not operate by the statute of uses 27 H. 8, to pass the legal estate to the lot, or any other property referred to them to Mrs Thompson. That it remained in Mr Richard Stockton during his lifetime, devolved by his death on his heir at law, captain Stockton, and now remains in him on a trust executory, it never was and is not now one executed by that statute.

[Magniac and Company v. Thompson.]

We have also been requested to charge you on three other points of law :

1. That the expenditure of 5000 dollars, in furnishing the house is, per se, fraudulent on creditors. We think not. Furniture is a part of the marriage contract, to be provided by Thompson as he should think fit. He had a reasonable discretion which he might exercise according to their station and associations in life, proportioned to the kind of house and extent of income. The trustee could not at law, or the wife in equity, compel Thompson to furnish it extravagantly, or at useless or wanton expense ; if he had done it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we could say that it is a fraud in law, to expend 5000 dollars in furnishing a house costing 13,000, and the establishment to be supported by the income of 40,000 dollars invested, we must be satisfied that it is extravagant and unwarranted at the first blush, and to an extent indicating some fraudulent or other motive, unconnected with the fair execution of the contract. Not being so satisfied, or that there has been a clear abuse of the discretion confided to Mr Thompson by the contract, we cannot charge you as requested.

2. That the delivery of the notes to captain Stockton in 1829 was a fraud per se. We instruct you that this was no fraud, if it was done in order to comply in part with the agreement ; if it was colourable, made with the intention of covering and concealing so much, under pretence of the marriage contract for Thompson's use, and so received by the trustee, it was legally fraudulent as to creditors ; but though delivered with such intention by Thompson, if not so accepted by captain Stockton, then he might apply them to the trust fund, and was bound to do so. Being done to carry the agreement of December 1825 into execution, its having been done on the eve of the judgment confessed in New Jersey, makes no difference ; had it been to make a new settlement after marriage, if it was in consideration of a portion or property, it would not have been fraudulent per se. The time which intervenes between making provision for a wife, and the contracting the debt or obtaining a judgment against the husband, is not a matter which makes it per se a fraud, it may or may not be suspicious, and connected with other circumstances deemed evidence of it. 4 Wheat. 506, 507 ; 8 Wheat. 238 ; 3 Johns. Ch. 485, 494.

[Magniac and Company v. Thompson.]

3. That the marriage agreement is void because not recorded within the time required by the law of New Jersey for recording deeds.

The covenant to stand seised to the uses declared, would come within this law if the uses were executed by the statute, so as to make it an actual conveyance or deed passing the legal estate ; but being executory, it is only a covenant giving an equitable estate to those for whom the trust was created and continues, and not a deed. But considering it as a deed, the want of recording does not make it void between the parties, though it would become void as to the creditors (perhaps), and purchasers from Richard Stockton without notice, but the omission to record this agreement is no fraud on the plaintiffs, and cannot affect them. Not being void between the parties, it gives Thompson no other estate or interest but such as arises from the trust ; he can have none incompatible with it, our instruction therefore is that the marriage contract is not void for want of being recorded in time. The possession and occupation of the house by Thompson is consistent with and a part of the agreement, his use of it and the furniture is a necessary consequence of the marriage, and if the contract is valid, such possession is no evidence or badge of fraud.

You will apply these principles of law to the evidence and find according to your opinion of the facts.

The jury found for defendant ; judgment was rendered on the verdict and affirmed by the supreme court on a writ of error. 7 Peters 348, &c.

Circuit Court of the United States.

PENNSYLVANIA, OCTOBER TERM 1831.

BEFORE

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

THE UNITED STATES V. MITCHELL AND FISHER.

Passing a paper is putting it off in payment or exchange. Uttering it is a declaration that it is good, with an intention to pass, or an offer to pass it.

The party accused of passing or uttering counterfeit paper, must be present when the act is done, privy to it, or aiding, consenting, or procuring it to be done. If done by consent, all are equally guilty.

Passing a counterfeit note in the name of a fictitious person, an assumed name, or on a bank which never existed, is within the law. It is not necessary that the note, if genuine, would be valid, if on its face it purports to be good; the want of validity must appear on its face.

The possession of other counterfeit paper by the defendant or a confederate at the time of passing counterfeit notes, is evidence of the scienter.

THE defendants were indicted for uttering and passing a counterfeit order or check drawn by Cummings, president of the office of discount and deposit of the Bank of the United States at Savannah, countersigned by the cashier thereof, payable to the order of Bullock, directed to the cashier of the Bank of the United States, for the payment of five dollars. It appeared in evidence that the defendants came together from Philadelphia in a gig about twenty miles; at a tavern where they stopped, Fisher attempted to pass the order or

[United States v. Mitchell and Fisher.]

check laid in the indictment, which was a counterfeit, Mitchell was present under an assumed name. In the stable where they stopped on the road, was found a quantity of similar paper, and in a part of the gig was also found a large bundle of the same paper, all counterfeit. The circumstances in evidence were strong to show a concert between the defendants, and their knowledge that the order in question was counterfeit. The prosecution was conducted by Mr Dallas, district attorney, and the defence by Messrs Rush and Williams.

BALDWIN, J., to the jury.

That the order or check laid in the indictment, is forged, is clearly proved, and cannot be doubted if you believe the witness; your next inquiry will be, whether it was passed, uttered or delivered as true, knowing it to be counterfeit by both the defendants, or either of them.

The passing or delivering of a paper, is putting it off or giving it in payment or exchange; uttering it, is a declaration that the note or order is good, 2 Binney 339, or an offer to pass it as good; to merely show it, without an offer to pass it, or depositing it for safe keeping, is not an uttering, there must be an intent to pass it as good; Russ. & Ryan 200; to convict a party for uttering or passing, he must have been present at the act, 2 Leach 1096; 2 East's C. L. 974; Russ. & Ryan 25, 249, 363. But if he delivers the paper to a servant, to be sent to a customer, Russ. & Ryan 212; 2 Leach 1048; 4 Taunt. 300, or is sufficiently near to the person who utters or passes it with his privity to give his assistance, Russ. & Ryan 363, or acts his part, or does any thing connected with the uttering or passing, Russ. & Ryan 446, the party accused is considered as present; so if he, knowing the paper to be counterfeit, delivers it to another, who, knowingly, passes as true, Russ. & Ryan 72; 4 B. & P. 96; 2 Leach 978, or gives it to a boy for the purpose of passing them, and he does pass them; Carr. C. L. 191; the note is uttered when it is delivered for the purpose of being passed, when put off they are passed, and every person who is present and consenting to the uttering or passing, or in any way aiding or assisting in doing it, or doing any act or thing in concert with the person who utters or passes the paper, which is connected with their common object, is guilty of the offence.

The knowledge that the paper was counterfeit, is a question of

[United States v. Mitchell and Fisher.]

fact which the jury must ascertain from the whole conduct and demeanour of the parties accused, their acts and declarations during the transaction, or it may be inferred from their having in their possession, or the possession of an accomplice or confederate, other counterfeit paper of the same manufacture, Carr. C. L. 195, of similar appearance, Russ. & Ryan 120, 244, 247, or such paper found in a place of which one of the parties had the key or control. Russ. & Ryan 110; 5 Bos. & P. 87, &c.; 4 B. & P. 93, 94. This evidence is admitted on indictments for forgery, in order to show that the defendant knew the note in the indictment to be forged, from the fact of having with him, or in his custody, other counterfeit paper for the purpose of passing it, it being presumed that if he knew the latter to be counterfeit, he knew the other to be so.

It has been contended by the defendants' counsel that this prosecution cannot be sustained, because it is not proved that the name of Cummings, and the indorsement of Bullock, are forged; and because the order in question is not obligatory on the bank on whom it is drawn. But the law is well settled, that it is forgery to counterfeit a paper in the name of a person who never existed, 1 Leach 83; 2 E. C. L. 991; 6 Serg. & Rawle 570; Foster 116, or in a fictitious name, 1 Leach 172, 215; 2 E. C. L. 690, 957, 959; R. & R. 75, or on a bank when there was no such bank as the paper purported, 6 Serg. & Rawle 569, or in an assumed name, R. & R. 209, 260, 278, 290, if it is done with the intention to defraud, and the paper on its face purports to be good and genuine. 1 Leach 103; 10 State Trials 183.

It is not necessary to a conviction, that the note or order, if genuine, would be obligatory on the parties whose names have been counterfeited; if it purports to be payable to order, and is not indorsed, R. & R. 149, 186, or if it wants any requisites enjoined by law to give validity to the genuine paper, as a stamp, &c., 2 Leach 703, 885, 958; 2 E. C. L. 956, 942; R. & R. 193, 195, 255, 297; 4 B. & P. 1; R. & R. 67, or if it purports to have been issued by a bank which is prohibited from issuing or circulating such paper under a penalty, 12 Serg. & Rawle 237, or if the forged paper purports to be the will of a man who is alive, 1 Leach 99; 2 E. C. L. 950, 1001; 6 Serg. & Rawle 570, the counterfeiting it is forgery. If the paper on the face of it is void, then it is not the subject of forgery, but if its invalidity is owing to any thing not appearing on its face, it is the sub-

[United States v. Mitchell and Fisher.]

ject of forgery. 12 Serg. & Rawle 237 ; 1 Leach 431 ; 2 East's C. L. 953, 954. If paper is forged, and is calculated to impose and deceive persons of common observation, the uttering or passing of it is the offence defined by the law. Assuming the order in the indictment to be a forged one, it is not material whether the signature or indorsement is genuine, the paper is false and counterfeit as an order or check on the bank. Nor is it material whether the bank would be bound to pay it if genuine ; it purports to be an order for the payment of money, which binds the drawer, though it may not bind the bank. You will apply these principles of law to the evidence and find accordingly ; in point of law, the evidence is sufficient to convict both defendants ; you will judge whether it is so in fact. If you think they come together for the purpose of passing counterfeit money, it is immaterial who did the acts which constitute the offence ; or if they came without such design, but afterwards formed it, or acted in any way in furtherance thereof, you will find both guilty if you think either of them consummated the offence, or you will find them separately guilty or not.

The jury found Fisher guilty, and Mitchell not guilty.

UNITED STATES V. SHELLMIRE.

An order or check drawn by the president of a branch bank of the Bank of the United States, on the cashier of the bank at Philadelphia for the payment of money, is an "order or check" within the 18th section of the act chartering the bank. The bank is bound to pay such orders or checks, and the indictment may charge the passing such counterfeit order to be with the intent to defraud the bank, or the person to whom it is passed.

The law presumes the intention in passing counterfeit paper to be to defraud any person who may suffer a loss by receiving it as genuine.

Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness, not in swearing rashly and inconsiderately, according to his belief.

THE defendant was indicted for uttering, passing and publishing as true a counterfeit order, purporting to be an order upon the cashier of the Bank of the United States in the words and figures following,

"(5) A. 10,363. A. 10,363. (5)

"Cashier of the Bank of the United States,

"Pay to Thomas Mather, or order, Five Dollars.

"Office of Discount and Deposit, Mobile, the 13th day of Oct. 1829.

"Geo. Poe, Cashier. Philip M'Closkey, President.

"Fairman, Draper, Underwood & Co."

Indorsed, "Pay the bearer, Thomas Mather."

knowing the same to be false, forged and counterfeited with intent to defraud the Bank of the United States.

On the trial it was objected by Mr Brashier and Mr D. P. Brown, for the defendants, that the order laid in the indictment was not within the law, and that the indictment could not be sustained, because the offence was not laid to be with the intent to defraud the person to whom the order was passed. Among other questions which arose on the evidence was this: several witnesses by the name of Burke testified to the presence of a person by the name of Rush at the time of passing the order in question, in which they are contradicted by a number of witnesses for the defendant. It was contended by the defendant's counsel that they were perjured if they swore rashly and inconsiderately, though according to their belief, if their evidence was untrue in relation to the presence of Mr Rush, they were not to be believed, and relied on the case of Cornish, 6 Binney 249. Mr Dallas, defendant's attorney, contended, that perjury consisted in

[United States v. Shellmire.]

swearing falsely and corruptly, contrary to the belief of the witness.

BALDWIN, J., to the jury.

The counsel of the defendant has presented to the court the question, whether the orders or checks of a president of a branch Bank of the United States, drawn on the cashier of the mother bank, come within the meaning of the words "order or check," mentioned in the eighteenth section of the law incorporating the bank. The point has not been argued, but it has been made. It arises necessarily, is vital to the prosecution, and must be decided by the court. The words of the law are very plain, "*or any false, forged or counterfeited order or check upon the said bank or corporation or any cashier thereof,*" broad enough to embrace this paper, which on its face purports to be such an order, and if genuine, would be one, or any order or check on the bank or any of its cashiers at the branches or here, or any draft or bill for the payment of money, which in law would be deemed an order or check. Is this comprehensive description narrowed by any other parts of the law? We find in it no prohibition direct or indirect against issuing this kind of paper either by the bank or any of its branches, or any word or expression by which congress has excluded it from the purview of the eighteenth section; neither can we perceive any thing in its nature which would justify such inference. The only restriction on the issuing of any paper, is in the proviso to the twelfth fundamental article in the eleventh section of the charter. The bank can make no bill obligatory or of credit under its seal for the payment of a less sum than 5000 dollars; the bills or notes issued by order of the corporation, signed by the president and cashier, are made as binding and obligatory on the bank as those of private persons, but all their bills and notes must be payable on demand, unless of a sum not less than 100 dollars, and payable to order; none of these restraints apply to an order or check; the notes or bills alluded to are such as contain a promise to pay money, and the bills obligatory are such only as are under seal, and for sums not less than 5000 dollars. The bank is left free to contract debts by any other mode than by their promissory note or an obligation under seal, with no other limitation than is contained in the eighth fundamental article, which is merely as to amount, the only effect of which, is not to exempt the bank from liability for the excess, but to make the directors, under whose administration it shall happen, per-

[United States v. Shellmire.]

sonally liable. The words of this article are, in our mind, very conclusive on this point. "The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note, or *other contract*, over and above the debt or debts due for money deposited in the bank, shall not exceed the sum of 35,000,000 dollars," &c. This is an explicit declaration that the bank may make, and are bound by contracts other than those by bond, bill, note or deposit. These other contracts must be taken to mean and be co-extensive with ordinary transactions of banks. We certainly cannot confine them to limits narrower than those subjects which the charter recognises as those on which the bank are to act. Deposits, discounts, drawing, indorsing, buying, selling bills of exchange, or taking them for collection, dealing in gold or silver bullion, paying for buildings, improvements, salaries and contingent expenses, are "other contracts," by which the bank may incur debts, and are bound to pay them to any amount to which they may be contracted by them or under their authority. In all these operations, checks or orders on the bank or its cashiers, are indispensable to conducting the business of the bank. They are peculiarly so when we consider the connection between the bank and the government and its branches. Being the depositories of the public money,—bound to transfer it without charge or commission from the place where it is received to the place where it is wanted or required to be deposited,—bound to distribute the money of the government among its creditors,—to pay the salaries of public officers,—to act as commissioner of loans in the different states, in the payment of the public debt and pensions,—there must of necessity be drafts, orders and checks by the bank on its branches, and by the branches on each other, and on the bank. The branches are offices of discount and deposit. Independently of the duties enjoined on them by the charter, for the convenience of the government, there were great and powerful reasons for the incorporation of the bank, and the establishment of its branches, to create and continue a sound, uniform currency, facilities for internal exchange and remittance. It cannot be contended that drafts, orders or checks, drawn by or on the bank, or any branch, are not legitimate means by which all these objects, both public and private, could be accomplished, or that they can be accomplished without them. There is no pretence that there is any express or implied prohibition making them unlawful, and no good reason can be assigned why the bank, individuals and the public

[United States v. Shellmire.]

should not have the same protection against any injury which might result from their being forged or circulated, as the promissory notes of the bank, or the drafts, orders, or checks of individuals upon a cashier of the bank. It is, in our opinion, no answer to these views, that the law has not expressly authorized the officers of the branches to draw on the bank: it is enough for this point that they are not prohibited from doing so: it is an act indispensable to the transaction of their ordinary business, in order to meet the wants of the public and others. The bank may contract otherwise than by bond, note, or bill. They may authorize the branches to draw orders, checks, or bills upon them, whether in funds or not,—but authorized or not, the paper has the same validity; if genuine, the drawer or drawee is bound for payment. It would be introducing a new principle into our code of criminal law, to say that the guilt or innocence of the accused would depend on the fact of the person in whose name a paper is forged having funds or authority on which he could draw his order or check. If a genuine bill is wanting in some requisite to give it currency, as the indorsement of the payee when payable to order—or if a positive law directs that besides the proper signatures, some other act should be done to give it any validity between the parties or to permit it to be read in evidence—as that it should be stamped—the crime of forgery is as complete by forging or knowingly passing it before indorsed or stamped, as after. *Bailey on Bills* 442, *Am. ed.* 382; *United States v. Fisher*, ante 368.

To save the party from the penalty on account of the invalidity of the paper if genuine in fact, it must be shown to be wholly illegal and void in its operation, so that no one could be injured by its being forged or passed upon him. The genuine paper must be as worthless as its counterfeit. The law embracing then all orders or checks on the bank or any cashier thereof, with intent to defraud the bank or any other person, containing no exceptions, excluding no paper which comes within the definition or common acceptance of an order or check, or prohibiting the issuing or circulation of those drawn by the presidents of branches, we are bound to declare them to be within the words, spirit and meaning of the law, equally with the notes of the bank or the checks or orders of individuals.

You will therefore understand us as distinctly laying down the law to be, that it is criminal to forge or pass paper of this description.

The next question of law which arises in the case is, whether that part of the indictment which charges that the accused passed the

[United States v. Shellmire.]

order or check in question, with intent to defraud the Bank of the United States, has been made out.

On this part of the case the law is well settled; the indictment must allege the offence to have been committed with the intention of defrauding some person or corporation, and this allegation must be proved as laid. This is the general rule, but it must be taken with this qualification. If the person in whose name a forged note, bill, order or check is drawn, or the one on whom it is drawn, would, if genuine, be bound to pay it, the law infers and takes as proved the intention to defraud and injure such person, from the act of forging, or knowingly passing such paper. Bailey on Bills 442, Am. ed. 386; Russell & Ryan 169, 291, 292; 2 Taunt. 333, 334.

It is not necessary that there should be any actual injury sustained or fraud practised in fact, on the person who was the subject of the meditated fraud or injury; this part of the offence consists in mere intention, and if that intention can be consummated the offence is complete. It is enough that it may probably or possibly be done. 2 Str. 749; 2 L. R. 1469; 2 W. Bl. 787; 4 Wash. 727; 2 Taunt. 333.

The passing of this order or check is alleged to be done with intent to defraud the Bank of the United States; it therefore becomes necessary for us to inquire whether the bank might or could be defrauded or injured if the paper was genuine. By the fourteenth fundamental article of the charter of the bank, it is bound to establish branches in certain cases. It is authorized to establish them wheresoever they think fit, within the United States, and to commit the management and the business thereof to such persons and under such regulations as they may think proper, not being contrary to law or the constitution of the bank; or instead of establishing branches, they may employ other banks, with the approbation of the treasury, to manage the business proposed, other than for the purposes of discount, under such agreements and under such regulations as they may deem just and proper.

It thus appears that the branches are legitimate emanations from the parent bank, who may commit their management to such persons, and subject to such regulations as they think proper, under no other limitations to their power than the laws of the land and their own charter.

The operations of the branches are carried on with the funds of the corporation by officers of its appointment, and under its regulations; they are its agents, capable of binding it by their contracts;

[United States v. Shellmire.]

all their transactions are for the benefit of the bank, who cannot disavow them unless in a clear case of an excess or abuse of their powers, under such circumstances as would invalidate the contract of an agent of any other corporation or an individual. Any business may be done at the branches in relation to discounts and deposits which may be done at the parent bank; it is liable to depositors for all balances due at the branches, for all drafts, orders or checks drawn by its officers on their own cashier, by their own authority.

The act of establishing a branch, is, per se, the creation of an agency; it is an authority not only to the extent of the regulations under which their agent acts, but to the extent of all acts and transactions of the officers of the branches which the bank have been in the habit of adopting and confirming, on the same principle that individuals are liable on the contracts of their wives and servants, who have been permitted to deal on their credit, and in their names; or a merchant, whose clerk is in the habit of writing letters, signing notes, bills and checks in his name, though without any written or express authority, by the adoption and recognition of which he authorizes the public to consider his clerk as his agent, authorized to do in future what he has been in the habit of doing with his knowledge and assent. It would be strange indeed that the bank should not be liable for checks or orders drawn by its agents at their own branches, which not only form a very important item in the currency of the country and the operation of the branches, but which the bank have for years daily ratified and sanctioned by their payment; the uniform course of business transacted between the bank and its branches, furnishes such a strong legal inference and presumption of its being authorized by the regulations under which they have been established, that the burthen of proof to the contrary is clearly thrown on the bank or any other person who would attempt to show that the paper was not obligatory upon them. It would be a severe reflection on the bank to suppose that they would for a moment refuse payment of these checks and orders, and our system of jurisprudence would deserve little of public respect or confidence if the law would not coerce it.

But the charter is not silent. The eighth fundamental article makes the bank liable for all debts, though they exceed the amount limited; the fourteenth makes the offices of discount and deposit its agents; the sixteenth section makes the bank the depository of the public money, and imposes on it the obligation of transferring, distri-

[United States v. Shellmire.]

buting and paying it under the directions of the treasury ; and by the seventeenth article, the bank is bound to pay in gold and silver all its notes, bills and obligations, and all deposits in the bank or its offices ; and the proviso enacts, that congress may enforce and regulate the payment of other debts under the same penalties as are prescribed for the refusal to pay its notes, bills, obligations and deposits. The mode in which the bank contracts a debt, the shape it assumes, or the places where contracted, is of no importance. The offices being its agents, the debts contracted by them become the debts of the corporation, imposing a duty to pay them, which may be done at or by the branches or the bank. If the payment is made in coin, the debt is extinguished ; if made by a draft, order or check, the debt remains until they are actually paid. Unless the holder expressly takes them as payment, and at his own risk, they create a new duty or obligation, which the bank is as much bound to perform as the old one for which it is intended to make satisfaction. It is a matter of mutual convenience, whether the old debt or duty shall be extinguished by payment or taking paper, whether in the promissory notes of the bank, or orders or checks drawn upon it. They may be in large drafts or orders for remittance, or small ones for currency or circulation, and in any form, with or without ornaments, devices, or marks. Whether they resemble in these particulars the notes of the bank, is immaterial ; their substance and legal effect are the same ; they create a new debt or duty obligatory on the bank. It is bound to honour all the paper which it issues or gets into circulation by its authority or agents. Paper of the kind now under consideration, can be put into circulation in no other way than by being issued in payment of a debt or other equivalent. If, on the requisition of the treasury, an officer of the branch at a place in which public funds were deposited, should draw his order on the cashier of the bank or any branch at a place to which it was required to transfer them, or in distributing the public money among public creditors, and disbursing officers of the government, paying salaries, pensions, or the public debt, should as a matter of mutual convenience and consent, give drafts, orders, or checks, either for remittance or circulation, on the bank or another branch, the bank would be as much bound to pay them as they would to pay the same amount to an officer or creditor of the government, who would deposit to his own credit the amount thus received through the bank. The same rule would apply to an individual depositor, a creditor of the bank, or one who had

[United States v. Shellmire.]

an order or check on them, and would receive payment in the shape of branch orders; so, if a branch makes a contract of discount, and pays the proceeds by drafts on the bank, or any other kind of paper to suit their convenience, these obligations necessarily result from the contracts of deposit and discount. But there is another contract equally binding, that of purchase and exchange. An individual desirous of procuring a medium of remittance or circulation, exchanges with a branch his gold, silver, or any paper which they accept, as an equivalent for their drafts, orders or checks, large or small, as the case may be; stands in the same position to the bank as a previous creditor, depositor or holder of any demand upon them. He pays his money unto the coffers of the bank, who receive it from their agents as the product of the contract made by their drafts and orders, all the profits of which go directly to the bank. To refuse payment in any of these cases, would be a fraud too palpable to be tolerated—wholly repugnant to every dictate of justice and rule of law.

The bank then being liable to pay paper of this description, if genuine, it follows that the forging or knowingly passing it, could and might be intended, and operate to defraud the bank. This raises the legal inference and presumption that such was the intention of the accused. When the law infers or presumes a fact, or an intention as resulting from the evidence, a jury may and ought to find it as if it was in direct proof before them; the inference and presumption of the payment of a bond after twenty years, without demand or payment of interest—the existence of a deed of land after thirty years' possession—the malicious intent which is implied from the act of speaking or publishing scandalous words in civil cases—the inference of malice aforethought which the law draws from the unlawful killing of another not explained—the inference of larceny from a man being found in the possession of stolen goods and not accounting for them; and what you have heard in this case, the legal presumption of the accused knowing the order in question to be forged, drawn from his having passed another forged order of the same description, are among the familiar cases where a jury ought to and will take legal inferences, when not rebutted by positive testimony. The jury will so view it in this case, and though they may think that there is direct evidence of the intention to defraud Burke, and that he was actually defrauded, and the indictment would be sustained if it was so laid, yet it does not follow that there was not also an intention to defraud the bank. In our opinion, the

[United States v. Shellmire.]

facts of the case amount to an intention to defraud both Burke and the bank; that the indictment would be good in law, and supported by the evidence, if the offence was said to have been done with the intent to defraud either or both, and therefore instruct you that the allegation of the indictment in this particular is sufficient in law, and made out by the evidence if you believe the witnesses.

An important question on the evidence has arisen in this case on which we deem it necessary to give you our opinion.

It has been contended by the counsel for the prisoner, that if you shall believe that Mr Rush was not present at the races, that Burke and others who have sworn to his being there, and to his identity, are perjured if they have done so rashly, without knowledge, or using proper means of obtaining it, though they may believe in the truth of what they attest. To this position we cannot assent; with all possible respect for the private and judicial character of the learned judge, who pronounced the opinion of the supreme court of this state in the case referred to, we feel bound to express our decided dissent to the decision given. The statute 5 Eliz., ch. 9; 2 Ruff. 549; 3 Inst. 163, adopted in Pennsylvania in 1718, 1 Dall. St. Laws 143, makes it of the essence of the offence of perjury, that it be committed *wilfully* and *corruptly*. Such are the very words of the law, which in our minds are not and cannot be taken as synonymous with *rashly* and *inconsiderately* swearing as the belief of the witness prompts him. His negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable him to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be *wilful* where the oath is according to the belief and conviction of the witness as to its truth. It could not be asserted, consistently with any legal principle, that an indictment for wilful and corrupt perjury could be sustained, by proof of a witness having sworn rashly and inconsiderately to what he believed to be true. The case in 6 Binney is supported by only one decision, and that in the Star Chamber. 3 Inst. 166.

We should be sorry to follow in this court the precedents of that in criminal prosecutions, and deem it unnecessary to apply to their proceedings, any other remarks than those which fell from the greatest common law lawyer in Westminster hall (Justice Yeates). "Next we are told of some proceedings in the Star Chamber, a court the very name whereof is sufficient to blast all precedents brought from it." 4 Burr. 2373.

[United States v. Shellmire.]

On this subject we therefore give you our most decided opinion, that you cannot be justified in imputing perjury to the witnesses, who have sworn to the presence of Mr Rush on the race ground and to his identity in court, unless you shall believe, not only that Rush was not there, and that the fact is contrary to their oath, but that they swore wilfully and corruptly, contrary to their belief of the truth, whether they did so, is a matter for you to judge. It is in our opinion of infinite importance in this case for you to decide with the utmost deliberation on this point, as we think the prosecution mainly turns upon it.

If in your opinion the Burkes have committed wilful and corrupt perjury, touching any thing in this case materially affecting the guilt or innocence of the accused, they are wholly unworthy of credit as to any other matter; a witness perjured as to one fact, ought not to be believed in any other, this we do not say to you as matter of law, for you may believe him in other respects if you will. But if we should in any such case, pass sentence on a prisoner convicted on such evidence, it would be with great reluctance, and little satisfaction with our administration of the penal justice of the union.

On the other hand, if you should think these witnesses testified under a belief in the truth of their story as to Rush, you would probably not think it would be doing them or yourselves justice in disbelieving such facts of their evidence, as were not contradicted, disproved, or explained by the accused. If you should believe they swore rashly and inconsiderately as to one material fact, it might very properly give such a tinge to all they said, as to induce you to take their relation of other facts with great allowance, but would not justify you in wholly rejecting it. In making up your opinion on this part of the case, you must remember that an indictment is depending against Mr Rush; we would recommend to you, not to examine very closely into the evidence which bears on his presence on the race ground; for the purposes of this trial, it is better to consider that in this respect, the witnesses on the part of the United States are at least mistaken, and decide on the case of the prisoner on that supposition.

In making this suggestion, however, you will not consider us as expressing our opinion on the weight of evidence, so far as it applies to Mr Rush; it is due to him and the United States to suspend any opinion.

Verdict, guilty.

ASKEW V. ODENHEIMER.

In Pennsylvania all trustees are entitled to a commission on moneys passing through their hands; the usual rate is five per cent, any departure therefrom is under special circumstances.

If a partner who has committed frauds on the firm agrees to indemnify the injured party to his satisfaction, by an assignment of all the partnership effects for his indemnity, such assignment will be construed liberally in his favour, and will be reformed in equity so as to meet the intention of the parties in conformity with their agreement.

But the injured party will not be allowed to be the judge of his indemnity.

As a trustee he will be confined to such satisfaction as a court of equity deem reasonable.

If the books and papers of the firm have been destroyed or suppressed, false entries made in them, or no entries made by the partner who has charge of them to his debit, with a view to fraud, the injured partner may support a specific charge by his own affidavit, but not by one which specifies no amount under any particular item.

On a bill by the fraudulent partner for an account, the master may charge him on any evidence which is competent or admissible as proof of the item; he cannot hold the injured partner to such degree of proof, as would justify a charge under ordinary circumstances, against a customer or partner; there must however be some proof.

The general rules on which courts of equity act in *odium spoliatoris*.

THE bill set forth a partnership between the parties commencing in 1822, and terminating in March 1829, when the following assignment was made by the complainant.

“Whereas, there is reason to believe, that in keeping the books of the firm of Askew & Odenheimer, errors and misentries have occurred, of which the amount cannot be ascertained, but which errors are injurious to the interests of John W. Odenheimer, one of the partners of said firm, and it is just and proper that he should be secured against any loss resulting from these errors and misentries, which have been made by his partner Joseph Askew: Now, therefore, be it known, that the said Joseph Askew, in order to secure to his partner, the said John W. Odenheimer, his full and just and undiminished share in the stock and profits of said firm, and in consideration of the sum of 10 dollars to him in hand paid by the said John; has granted, bargained, sold, assigned, transferred, and set over, and by these presents, does grant, bargain, sell, assign, and transfer unto the said John, all the right, title, interest, property,

[Askew v. Odenheimer.]

claim, and demand whatsoever of him, the said Joseph, in law, in equity, or otherwise, in and to the moneys, goods, chattels, rights, credits, and effects, and in and to all the property, real and mixed, in which they the said Joseph and John are jointly at this time interested as partners in the above firm, or may be, to have and to hold to the said John, his heirs, executors, and administrators, to his and their use for ever: Provided always, however, that when an entire adjustment of the accounts of the firm be made, and debts due by the firm paid, all the deficiencies, losses and injuries resulting to the said John W. Odenheimer, shall be made up to him, to his reasonable satisfaction, this conveyance and transfer shall then cease to be operative; and the said John shall re-transfer the same to said Joseph. And it is further agreed between the parties hereto, that the business of the concern shall go on as usual, unless the said John W. Odenheimer shall find it necessary to stop the further progress, in which case, he is at full liberty to do so. And it is further agreed that the said John may proceed to collect the debts due, and wind up the said firm without any hindrance on the part of the said Joseph. In testimony whereof the said Joseph Askew, hath hereunto set his hand and seal this 25th day of April, A. D. 1829.

“JOSEPH ASKEW.

“Sealed and delivered in presence of Richard Paxson, Thomas Folwell.

“Proved before an alderman, by the oaths of the two subscribing witnesses on the 22d of May 1829, and recorded on that day.”

The complainant alleges that the errors and misentries were such as he thought himself entitled to make, without any injustice to his partner, in order to compensate himself for extra services to the firm, the amount of which did not exceed the sum saved in clerk hire, and was set forth in a schedule annexed to the bill. It then alleged, that the amount of errors and misentries had been ascertained, that all the objects of the assignment had been effected, that a large balance remained in the hands of the respondent, due to the complainant, which the former was applying to his own use. The prayer was for an account of what had been received since the assignment, of the amount of his claim on the complainant, for a re-transfer of his share of the partnership effects, and the payment of the balance of money on hand.

The answer admits the partnership, by the terms of which the

[Askew v. Odenheimer.]

defendant was to do the out of door business, and complainant to attend to the books and in door business of the firm ; it averred that there was great mismanagement by the complainant for some years, which he concealed by false entries in the books. That when called on to explain them, he promised to do so, but before this was done, a number of the books and papers of the firm were destroyed by fire, so that it became impossible to ascertain the extent of the frauds thus committed. That the respondent believed that he had sustained losses to the amount of 5000 dollars, exclusive of damages for breaking up the business of the firm, which was profitable, that he was not able to specify the extent with precision, but that they far exceeded the amount of damages stated in the bill, or in any account which had been made out. He therefore claimed to retain out of complainant's share of the partnership effects, a sum sufficient to cover the estimated amount of his losses by the misconduct of his partner.

A great mass of testimony was taken, by which it clearly appeared that the complainant had been for some time in the habit of committing frauds on the firm, in the manner recited in the assignment and otherwise. The evidence of the destruction of some of the books and papers of the firm by fire, was very clear, and very strong to prove that it was wilfully done by complainant, to conceal the frauds he had committed. The case was referred to a master, who reported misentries to the amount of 889 dollars, and goods taken to the amount of 250 dollars, for which the complainant had not charged himself ; the master reported a balance due to complainants of 5619 dollars and returned the depositions to the court.

Both parties filed exceptions to the report, which were argued at length by counsel on both sides on the evidence and law, the latter of which only will be noticed.

Mr Cadwalader and Mr Binney, for complainant.

The suppression or destruction of books and papers by complainant, does not dispense with the production of evidence on part of respondent, though it will help slight or defective proof of a charge ; every presumption is against the party who is guilty of suppression or spoliation, but there must be some prima facie evidence, sufficient to raise ground for the presumption, such as would authorize a jury to infer the fact. The court will not impose a penalty on complainant arbitrary in its amount, but will supply the defect and ascertain the truth as far as they can.

[Askew v. Odenheimer.]

Though by the terms of the assignment the correction of errors was to be ascertained to the satisfaction of respondent, it is not submitted to his arbitrary discretion to judge for himself; he must be reasonably satisfied, and the court will compel him to be satisfied when he is compensated to the full extent of the proof he makes of specific losses. Pandects, b. 2, sect. 6, 7; Poth. on Obl., No. 48. So where a party covenanted that if a title was good, he would pay 60 pounds in three months after he was satisfied he held the land by an undisputed title. It was held incumbent on the defendant to state a lawful claim adverse to, and better than the one conveyed. Falliard v. Wallace, 2 Johns. Rep. 395, 401.

The respondent has not insisted on the right to claim, according to his own conscience; he has offered and gone into proof before the master, to ascertain the extent of the fraud, as a matter of account, which is a waiver of the right now assumed, by which he is bound.

The assignment embraces only misentries, it was not intended to extend to the goods taken by respondent and not charged, this was never set up till the answer was put in, errors and misentries in the books refer to the face of the books, the meaning of the assignment is, that there shall be an accounting—an adjustment of the accounts of the company, when that is done the trust is terminated; the adjustment must be to the reasonable satisfaction of the trustee, but the measure of the reason of a trustee, is the rule of reason prescribed by a court of equity. Jones v. Knaps, Gilb. Eq. 146; Wolf v. Shaftesbury, 7 Ves. 480.

When a party insists on proof of a matter alleged against him, the degree of proof required depends on his position; if an allegation is made that a party has been deprived of evidence, it is answered when evidence is produced; here there is evidence as to the uncharged goods, to which the party will be confined, unless he will show that goods have been taken, which cannot be traced, or their amount ascertained. Respondent has not sworn to the particular losses he has sustained, he is bound by the thirty-fifth rule of this court to specify his exceptions to the master's report, and the court will sustain none which are not made according to its rules, unless for special cause shown. The question before the court is, whether the master acted correctly on the evidence before him, or if he was wrong, what he ought to have done. No evidence will be received but what was before the master, if one general exception is taken,

[Askew v. Odenheimer.]

which includes several matters, and one is right, the whole exception fails. 2 Madd. Ch. 510. The master is a judge, no evidence is admissible after the report is settled, and the facts he finds are presumed to be true, 2 Mad. Ch. 511, 516; exceptions are in the nature of special demurrers, the party must put his finger on the matters excepted to, 6 J. C. 592, and references to a master have the same effect, whether they are made by agreement of parties, or the order of the court.

Mr Kittera, for the respondent.

In making the assignment, it was not the intention of the parties to put the respondent to legal proof of the items of fraud by which he had been injured, but to have him satisfied to the amount which in his conscience he believed he had suffered; the object of the assignment was full and perfect indemnity to him, for all the consequences of the fraud, as clearly appears by the preamble and recitals. Their extent was known to complainant, but by his conduct, he has put it out of the power of respondent to ascertain it; in such a case the court will not control his conscience, when he swears to a certain sum, by putting him to the proof of items. The parties have made a standard, by which the trustee is authorized to settle the accounts, without any provision for any appeal from his judgment, as to what is a reasonable satisfaction. The court will not undertake to correct his judgment and oath, merely because there is a defect of proof as to items or amount; unless there is clear evidence that he has abused his discretion, or has fixed an amount unjust at the first blush, the complainant must disprove it clearly. If any other rule is adopted, the parties will be put in the same position, as if their conduct had been fair on both sides, the account between them will be a mere adjustment of balances, appearing on the books, or by legal evidence of charges and credits. The position into which complainant seeks to force us is this, he destroys our means of accounting, and then calls on us for a strict account by the rules of legal evidence; but he has placed us in a position from which no court of equity can remove us. By the assignment, the legal right to all the partnership effects is fully vested in the respondent, the court can take from him only so much, as the complainant can show is retained against equity and good conscience. His position is also a fixed one, he admits fraud in his bill, states the misentries, in addition to which we have proved the suppression and spoliation of the books, accounts

[Askew v. Odenheimer.]

and papers of the firm, in which position every presumption is against him. Courts of equity go further than courts of law, in odium spoliatoris, the oath of the party injured will support a charge, 1 Vern. 207; Childrens v. Saxby, 12 Vin. 10; 15 Vin. 312; 16 Vin. 356, S. C.

So where a will is destroyed, it will be presumed that it gave the opposite party a right to recover; 2 Poth. 336; 2 P. Wms 720, Cowper v. Cowper, 1 Bridg. Eq. Dig. 456, pl. 225. The same rule is applied to deeds, books, papers, accounts, &c.; their suppression raises the presumption that they contained what was against the party suppressing, and in favour of the other party, whose oath as to their contents must be admitted from necessity.

The court will construe the assignment liberally in favour of the respondent, it was avowedly made for his benefit, its objects were fair and just; and though in terms it extends only to errors and misentries, it will embrace all errors to his injury arising from whatever cause. He must have complete indemnity, and if the words used to afford it are not broad enough to comprehend each item of loss, the court will reform it according to the manifest declared intention of the parties. As the complainant was conscious of his own acts, and the respondent ignorant, except so far as they had become known to him, he shall not be prejudiced by an omission in the preamble and recitals, which was the language of the complainant.

In his answer, respondent averred his losses to amount to 5000 dollars, he claimed this amount before the master, and yet claims it; he has a right to produce all the evidence in his power in favour of his claim, either by proof of items or of undefined injuries, not choosing to stand on his oath alone. But this cannot be deemed an implied waiver of any right which his position gave him, and it is not pretended that he made any express waiver. His first, second, third and fifth exceptions meet the objections of the complainant's counsel, pointing to errors of the master, in confining himself to credits specifically proved by items and in amount, and disallowing any claim for the injury sustained by loss of the credit of the firm, and its consequent premature dissolution, while its business was highly profitable. An allowance for this was expressly claimed in the answer, and ought to have been made by the master. The court may not be bound by the oath of the respondent as to any precise amount, but must make some reasonable allowance for an injury which is

[Askew v. Odenheimer.]

apparent. As reported by the master, our credits are such only as are sustained by strict proof.

The opinion of the Court was delivered by BALDWIN, J.

This case comes before the court on exceptions to the report of the master, to whom this cause was referred on the 10th of June last, for an account by the defendant.

The account exhibited a balance of partnership effects in the hands of the defendant of 25,498 dollars 91 cents, to which both parties agreed. They likewise agreed on the sum on which a commission should be charged by defendant for his services, being 69,726 dollars 55 cents, but they differed on the amount of commission, the defendant claiming five per cent, the plaintiff willing to allow two and a half, the master allowed four to which both parties except.

In the case of Burr v. M'Ewen, Hale and Davidson, at April term 1830, this court gave their views on the subject of commissions to trustees, and are satisfied that they are in accordance with the settled judicial opinion and usage of the state. In Pusey v. Clemson, 9 Serg. & Rawle 209, and in the case of Walker's Estate, Ib. 225, the supreme court declare, that common opinion and understanding have fixed on five per cent as a reasonable allowance, and that cases in which the court may fix on a higher or lower rate, are to be considered as exceptions arising under the particular circumstances of the case. We think this a reasonable and safe rule, which will prevent much litigation if so understood and adhered to, and in this case we perceive no such circumstances as to induce us to depart from it.

The complainant comes into a court of equity demanding a re-transfer of his part of partnership effects, included in the assignment, alleging that the defendant has in his hands a balance of money justly due to the plaintiff, or his stock in the firm, which he cannot retain in good conscience, and withholds in bad faith. In such a case the court is not governed by the technical and strict legal construction of the words of the assignment, but the real meaning and intention of the parties in relation to the subject matter and object for which it was made. Though they were satisfied that the words were not broad enough to include all the errors and misconduct of the plaintiff which had been injurious to the defendant, we would not decree of course for the complainant as to those items, but adopt the principles of equity which the supreme court lay down as incon-

[Askew v. Odenheimer.]

trovertible, *Hunt v. Rousmanier*, 1 Peters 13: "Where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." They will compel "the delinquent party fully to perform his agreement, according to the terms of it and the manifest intention of the parties; so if the mistake exists, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will in general grant relief according to the nature of the particular case in which it is sought."

Deciding this question by these principles, we feel bound to consider the agreement and assignment as embracing all errors and misentries, whether of cash on the cash books, errors in not charging the plaintiff with goods taken by himself, or receiving money from customers and not accounting for it, and any other errors or misentries in keeping the books which would be injurious to the interest of the defendant. We do not think it important to examine minutely whether Mr Odenheimer knew of the omission to charge the goods taken by plaintiff, or of any other misentries than such as relate to those in the cash book; if he was ignorant of the existence of any others, it would be a good reason for our reforming the assignment, especially when their existence was known to plaintiff. His concealment of them from his partner, when about executing a paper intended to be a complete indemnity against all errors and misentries in keeping the books of the firm, would be a complete bar to any equitable relief, when we had before us abundant proof of errors and misconduct on his part highly injurious to defendant. We would not take from him the security of a fund given to him for an indemnity, until it had been made effectual for all the objects intended, and for which the plaintiff was in equity bound to make a provision. If the defendant had a knowledge of all the errors committed by plaintiff, it would not alter the case, the words of the assignment are broad enough to cover them; the plaintiff knew of them, and agreed that defendant should retain the stock assigned till all losses, deficiencies and injuries resulting from them should be made up to his reasonable satisfaction.

[Askew v. Odenheimer.]

We do not mean to decide, that the defendant is to be the judge of the amount which he shall retain out of the fund assigned ; he holds it in trust, subject to the supervision of this court ; for his own use, so far as he can reasonably satisfy us, that any alleged errors exist which operate to his injury, and for the plaintiffs for the residue. The cases cited by the plaintiff's counsel, fully support their position in this respect, and we think it the fair and equitable construction of the assignment.

Thus far the case is attended with no difficulty, but a very serious one has occurred in ascertaining the sum which we shall decide, on all the circumstances of this case, to be a reasonable satisfaction to the defendant for the errors and misconduct of the plaintiff.

The reference to the master was a general one for an account, and his report does not find facts, on the legal result of which we are to pronounce an opinion as on a special verdict or case stated. 2 Madd. C. 506. In stating the account between the parties, he makes specific allowances to the defendant, on account of errors and misentries, and returns the whole evidence for our consideration on the propriety of these allowances, which are the subject of exception by both parties.

That errors and misentries, to a considerable amount, have been made by the complainant, is admitted in the bill and the assignment, it is also abundantly proved by all the witnesses.

The burning of the books has not been conclusively brought home to the plaintiff, but the evidence is of that strong and convincing nature, as leaves no doubt on our mind that the act was committed by the complainant, and so we consider the fact to be.

Under these circumstances, he calls for the interposition of this court, to compel the plaintiff to account, to pay the balance in his hand, and re-transfer what remains of his share of the fund assigned, without producing any statement of the errors or misentries, giving no information which could tend to ascertain the amount, putting no estimate on the sum he thought himself entitled to for extra service, or what he had taken under such pretext, when he could have done it from his own knowledge. He does not swear to his bill, or even positively aver, that he had made no other errors or misentries to the injury of his partner than are referred to in his bill, or were proved before the master. Where papers are destroyed or suppressed by a party with a deliberate design to defraud or injure another, the presumptions of law are very strong against him,

[Askew v. Odenheimer.]

and there cannot well be a case more strong against a complainant in equity than this. Courts of law are very severe in punishing fraud, but when it is aggravated by the destruction or suppression of papers or books which would, if produced, be the means of detecting it, courts of equity will go beyond, and even contrary to the rules of law, and presume most liberally, in odium spoliatoris, 1 Cha. Ca. 293; 2 P. Wms 748; 1 Ves. Sen. 235; 3 Atk. 755, 756; 1 Sch. & Lef. 222; 5 Brown's P. C. 300, 324; 1 Vern. 207.

A court of equity will entertain jurisdiction of a trespass, where it is done secretly, so that it cannot be proved easily, as where on his own ground a man digs under ground to another's mineral. *East India Company v. Sandys*, 1 Vern. 127, 130.

So where an interloper trades to the East Indies, he shall admit his trading, and to some certain amount, because it is difficult of proof, 1 Vern. 130, 307.

So where a bailiff took a sum of money under an execution issued in breach of an injunction in odium spoliatoris, "the oath of the party injured is a good charge on him who hath done the wrong." *Children v. Saxby*, 1 Vern. 207; 1 Eq. C. Ab. 11, pl. 2; 229, pl. 11.

So where a man ran away with a casket of jewels, the oath of the party injured was allowed as evidence, *East India Company v. Evans*, 1 Vern. 308; but not to conclude the party committing the fraud. *Plumpin v. Bills*, 1 Vern. 272.

Where a plaintiff in equity has been guilty of fraud, and his bill is dismissed, the court will decree costs to the defendant, to be taxed on his oath, *Dorrington v. Jackson*, 1 Vern. 449, 450.

So as to the plaintiff where a bill of exchange was obtained by fraud and the oath of defendant was falsified. *Dyer v. Tymewell*, 2 Vern. 122, 123.

These cases fully establish the principle, that in cases of fraud, suppression and spoliation, the oath of the party injured is evidence, but not conclusive; the court must judge of the weight it is entitled to, under all the circumstances of the case.

The mere circumstance of a party having destroyed or suppressed a deed, book or paper, will not induce a court of equity to decree a penalty against him to deprive him of what may be his just right, to dispense with such secondary proof of the existence and contents of the paper which has been so suppressed or destroyed as may be in the power of the party injured to produce, or to give a decree in his

[*Askew v. Odenheimer.*]

favour, without some proof. 2 P. Wms 738, 748; Amb. 247, 249; *Saltern v. Melhuigh*, Sch. & Lef. 222.

It is difficult to define precisely what will be deemed *some proof*, as much must necessarily depend on the particular case; but there can be little danger in laying it down as a general rule, that where there is the least positive proof of the existence of a paper, or where it may be supposed or inferred from appearances out of which such supposition or inference necessarily or naturally arises, proof of spoliation would entitle the opposite party to a decree. *Cowper v. Cowper*, 1 P. Wms 750. If there has been actual spoliation by a party, every thing would be presumed against him in favour of those setting up a *prima facie* title; and though there is no actual spoliation proved, yet a complete suppression would, for the purposes of the suit, be equal to a spoliation, *Banks v. Stewart*, 1 Sch. & Lef. 222.

Where a widow made a deed of the greatest part of her estate, to the value of 800 pounds, to trustees for her children by the first husband, which the second husband destroyed, he was decreed to pay the amount without any account of the estate, *Hunt v. Mathews*, 1 Vern. 408; so where a defendant swore that he had burnt a deed, and afterwards produced it, he was compelled to admit the deed as laid in the bill. *Sansam v. Ramsey*, 2 Vern. 561.

Where a defendant in a bill in equity swore that she had delivered a will to the plaintiff, which he did not produce, she was held not to be bound to answer till the will was produced by plaintiff; on a final hearing, it was decreed, that having suppressed the will, it ought to be presumed most strongly against him, and to be taken as set forth by the party claiming under it, *Hampden v. Hampden*, 1 Brown's P. C. 250, 252.

Where a deed limiting a term was burnt by the defendant, who contended that the limitation was void, the court decided, that since a term might be limited in such a manner as to take effect, they would intend it to have been so limited in that case, and decreed a conveyance accordingly, *Dalston v. Coatsworth*, 1 P. Wms 731, 732, &c.; so where title deeds are suppressed, the court will decree possession to the party claiming under them till produced, *King v. Hounsdon*, Hob. 109; 3 Atk. 360.

Where on an account being decreed, the master reported that defendant had suppressed and embezzled some pages of accounts in a

[Askew v. Odenheimer.]

bundle, or that it had been done with his privity, the court disallowed his whole accounts for diet, &c., on account of embezzlement. *Waldour v. Berisford*, 1 Vern. 452; 2 P. Wms 749.

Where a will is suppressed by the executor or heir, he shall be compelled to pay a legacy bequeathed by it before probate, and without a citation in the spiritual court; equity interferes on the head of spoliation and suppression. 3 Atk. 360.

From these cases we may take the rules of equity to be well established, that where a deed, a will or other paper is proved to be destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption in *odium spoliatoris* applies in favour of the party who claims under such paper, though the contents are not proved. The fact of spoliation, suppression or embezzlement may be proved by the answer or oath of the opposite party, so may the contents of the paper; the same rule applies to matters of account; the mere embezzlement of books or accounts is sufficient to authorize a rejection of claims by the spoiler though supported by evidence, or the party spoiled may rebut the claim by his oath. But where he comes to charge the spoiler in account, in order to raise a debt against him, he must give some evidence beyond the fact of spoliation, his oath would be admissible evidence, its effect depending on the circumstances of the case. If he relies on other evidence he must make out a *prima facie* case, by proof competent for a court of equity to presume, a court of law to give a judgment on a demurrer to the evidence, or a jury to find a verdict in favour of the charge set up. This is what is understood by *some evidence*, it may be slight, yet if it conduces to prove the charge it is legally sufficient, its weight or credibility is a matter of discretion and circumstance. No specific sum can be charged against the spoiler on proof of the mere fact of spoliation, herein the rule differs from that which applies to a claim of property under a deed or will on which the right depends, and the thing claimed is ascertained.

The circumstances of this case would justify the utmost latitude of presumption in a court, jury, master or auditors; the fraud was premeditated, the spoliation wilfully made to conceal it, and we would not disturb a verdict or report which did not at the first blush appear to have debited the complainant with items, in support of which there was no evidence, conducing to make out the charge.

[Askew v. Odenheimer.]

So far as the master has debited the complainant, his report is confirmed ; but from the evidence returned with his report he seems to have held the defendant to proof not required by any rule, and to have withheld all credits not definitely proved, or at least to have allowed none which were not supported by such evidence as would have supported charges in an ordinary case between partners or merchant and customer. Were we to confirm this report, on a consideration of the evidence which accompanies it, it would confound all distinction between the spoiler and the despoiled, and tend to encourage rather than to suppress spoliation, by throwing on the innocent party the burthen of supplying the evidence which the other had destroyed.

The master has overlooked entirely one powerful item of evidence, the admissions in the bill of the complainant, which are conclusive on him, as well as on a master, a jury or a court, who can approve of nothing in contradiction or opposition to such admissions. *East India Company v. Keighby*, in the House of Lords, 4 Madd. Rep. 15, 21.

These admissions must be carried into every act of fraud, in taking money or goods furtively, the amount of which may be presumed to be equal to the object for which they were taken ; that is, to the saving of clerk hire for the services performed. We should forget the first principles of justice in confining the respondent to the rules by which the master has acted. One of the clerks testified to repeated acts of the complainant in taking goods not charged, of which he kept a memorandum, amounting to 570 dollars, exclusive of what was allowed by the master ; though the proof was not specific, we think it reasonably sufficient to justify giving the defendant credit to this amount, and direct it accordingly.

We have not thought it proper to direct any credits on the general averment in the answer that the injuries sustained amounted to 5000 dollars ; it is too vague to act upon satisfactorily. Had it been definite as to any particular fact, or the amount of injury sustained under any defined item, we might have directed a further allowance to the defendant, but it would be acting too much on vague conjecture for us to specify any particular amount. Though we should not have disturbed the report if the master had done it, we cannot feel justified in decreeing any particular charge under this general allegation.

[Askew v. Odenheimer.]

We have allowed no damages for breaking up the business of the firm, no sum was specified in the answer as applicable to this item, and no evidence is before us which enables us to ascertain what may be just ; there is therefore no prima facie case, either by the oath of the respondent or the evidence, for the allowance of any specific sum on this ground.

BAKER, EXECUTOR OF BAKER V. BIDDLE.

The sixteenth section of the judiciary act is a declaratory act, settling the law as to cases of equity jurisdiction, in the nature of a proviso, limitation, or exception to its exercise.

If the plaintiff has a plain, adequate and complete remedy at law, the case is not a suit in equity under the constitution or the judiciary act.

There cannot be concurrent jurisdiction at law and in equity, where the right and remedy are the same, but equity may proceed in aid of the remedy at law by incidental or auxiliary relief, though not by final relief, if the remedy at law is complete. Its jurisdiction is special, limited and defined, not as in England where it depends on usage.

A bill for discovery does not lie for matter of which plaintiff has knowledge and means of proof, or of matter whereof he has the same means of information as the defendant (as public records). If such bill is sustained, it does not give power to make a final decree, if relief is not incidental to the discovery, where nothing is disclosed by the answer, or the whole equity of the bill is denied.

Though the rules and principles established in the English chancery at the revolution, are adopted in the federal courts, the changes since introduced there are not followed here, especially on matters of jurisdiction, as to which the sixteenth section is imperative.

An objection to jurisdiction for the want of parties, of equity in the bill, or of there being a remedy at law, need not be made by demurrer, plea or in the answer, it may be made at the hearing, or on appeal.

A bill for an account does not lie, where an account has been rendered and received. If an account is retained an unreasonable time without objection, it becomes in law and equity a stated or settled account, and a bar to an action or bill to account.

A bill to account lies only when an action to account lies at law, and when the case comes under some appropriate head of equity jurisdiction.

It does not lie on an agreement to procure an assignment of judgments for the use of the plaintiff, when he has evidence of the agreement, and compensation for the breach can be had in damages, nor where there has been a great lapse of time in asking it.

The staleness of a demand may be relied on at the hearing, though there is no plea, or demurrer, or the answer does not insist on it; equity acts by analogy, or rather in obedience to the statute of limitations on stale demands.

Equity has cognisance only of executory trusts, not of those executed, or where a trust can be enforced at law; there must be some act to be done by the trustee.

A trust once executed cannot be revived by the non execution of a trust resulting from a subsequent agreement relative to the same subject.

An agency closed wholly or on any distinct matter, as to which no act remains to be done by the agent, is not cognisable in equity, under the head of account or trust.

THE substance of the case stated in the bill was the following.

Valentine Eckert was the owner of a valuable farm in Berks county, on which there were heavy incumbrances by judgment; his

[Baker v. Biddle.]

son-in-law, Isaac Baker, who resided in Virginia, on the 27th of April 1819, caused 2800 dollars to be put into the hands of the defendant, to be so applied as to prevent a forced sale of the property, and to protect Baker from loss; that the trust was accepted by the defendant, who agreed to procure assignments of the judgments, which he was directed to pay out of the money he received. By the letters of the defendant from time to time received by Baker, he was informed of the proceedings of the defendant, which resulted in a sheriff's sale of the farm to him in 1821, for 10,200 dollars, of which he gave Baker notice, who confided in the assurances of the defendant, that the agreement to assign the judgments had been complied with until March 1823, when he found that he would lose the money advanced on the judgments, by their not having been assigned to him.

On the 30th of April 1819, the defendant rendered an account, charging himself with the 2800 dollars, claiming credit for money paid on certain judgments therein specified, leaving a balance of 191 dollars to be applied to a debt due the Bank of Pennsylvania. Another account was furnished by the defendant after the sheriff's sale, by either of which he was indebted to Baker in a large balance. Baker made his will in 1829, appointing the plaintiff his executor, who demanded a settlement and payment of the balance, the defendant paid 1000 dollars on account, and offered to pay 695 dollars, the balance admitted to be due on receiving an indemnity against any claim on him by the creditors of Eckert, and exhibited a statement showing such balance. But this statement is inaccurate and unjust, as it gives Baker no credit for the judgments which were to have been transferred to him, and ought to have been paid to him out of the proceeds of the sale, leaving in the defendant's hands a large balance, the precise amount of which cannot be ascertained, inasmuch as the plaintiff has not a detailed account of costs and expenses and payments made by the defendant, for which balance he is accountable, but has refused to account though repeatedly applied to to do so, and denies that he ever agreed to procure assignments of the judgments he paid with Baker's money. The bill prays for a full answer to all the matters charged, whether the defendant did receive the 2800 dollars, and by means thereof procure the control of the sale of the farm, whether he assured Baker that he should have the benefit of the judgments he had paid, whether he did not

[Baker v. Biddle.]

cause the sale of the farm by execution, and by his silence confirm Baker's belief, that he was to be first paid his advances.

That he may set forth the dates and amounts of the judgments which were liens on the farm, the amount he paid thereon, the time of payment, whether the balance in his hands was mixed with his other money, that he be decreed to account for all moneys or liabilities for which he is accountable to the estate of Baker, and pay the balance with interest, and for such further and other relief as the case requires.

The answer admits that Eckert owned the farm, states the judgments against him to be 13,900 dollars, admits the receipt on the 27th of April 1819 of the 2800 dollars, and a deed for the farm from Eckert to Baker dated 10th September 1818, for the consideration of 20,000 dollars acknowledged 23d of January 1819, which he had recorded at the request of the person who gave it to him. He also received a bond of J. G. to Baker on which there was then due 894 dollars; at the time of receipt of the money, defendant was directed to pay certain judgments against Eckert, and to apply the balance with the proceeds of the bond to other judgments, so as to induce the creditors not to press a sale, till Baker would have time to pay all judgments entered before the acknowledgement of the deed, and he applied the money accordingly. He avers that in receiving or paying the money, he did not conceive he was agent, attorney or trustee of Baker, or acting for him in any capacity whatever, that he was not and is not bound to account to him or his representatives therefor, but that he acted solely to serve Eckert and family, so as to enable them to profit by the sale to Baker. He denies that when the 2800 dollars was put into his hands, he was directed or requested to procure an assignment of the judgments he was directed to pay, or that he agreed or undertook to have it done, or that any intimation was given to him that such was the wish of Mr Baker, the defendant believed that Baker rested on the security of the deed, and would pay the residue of the judgments. The bond of J. G. was due in July 1819 and defendant was directed to pay it to the judgment in which one Eesenbrier was plaintiff. The first communication received from Baker after April was a letter dated 24th of September 1819, directing the 2800 dollars to be entered on the judgments which had been paid, for the benefit of Baker, it being necessary then, as he was unable to pay all the judgments as he wished, and at the time agreed on for their payment, owing to the scarcity of

[Baker v. Biddle.]

money; that a sale of the farm was unavoidable, and had better be made by the sheriff. On the receipt of this letter defendant procured several of the judgments to be marked on the docket for the use of Baker, took out execution on one of them, levied on the farm and informed Baker by letter, who approved of what had been done, and desired the defendant to let him know the time of sale; this was done but Baker did not attend.

The farm was sold and purchased by defendant in November 1821, he gave notice thereof to plaintiff and offered to convey it to him, but he declined, he also stated to him the appropriation of the purchase money to which no objections were made. He never received the money due by J. G., and delivered up the bond to the order of plaintiff, he never refused to settle with plaintiff or to pay him any balance in his hands, but on ascertaining the balance, authorized plaintiff to draw on him for 1000 dollars, paid that amount, forwarded him an account with such explanations as gave him a full account of what had been done. He afterwards offered to the plaintiff's counsel to correct any errors in the account, and put into his hands 695 dollars the balance of the account as stated by defendant to be paid plaintiff on his indemnifying defendant. He avers this account to be correct except an error of 131 dollars, which he is willing to pay on being indemnified; that he never undertook to have the judgments assigned, or assured Baker that they had been assigned so as to give him the benefit of them. The two accounts together with the usual affidavit were annexed to the answer.

A great number of letters between the defendant and Isaac Baker were read, at the hearing several witnesses were examined, but there was nothing which varied the case as it appeared in the bill and answer, so far as affected the questions on which it was argued and decided.

Mr Joseph R. Ingersoll, for complainant.

By the deed from V. Eckert to Isaac Baker, the testator had become the owner of the Moslem farm, either in his own right or as trustee for Eckert; the 2800 dollars was placed in defendant's hands for the purpose of paying such judgments as were liens before the date of the deed, and having been accepted by him he became a trustee for some one. Though he denies that it was for Baker, he admits the money was received from Baker to save the property, he was not bound or authorized to pay any judgment against Eckert

[Baker v. Biddle.]

after the deed took effect, as it not only would not tend to save, but would expose the property to be sacrificed on process by the elder creditors. Notwithstanding his denial, he has accounted to Baker and him only, has paid his executor 1000 dollars out of the money received from him, has paid judgments and marked them on the docket for his use, and paid for recording the deed out of his money; which acts estop defendant from denying the agency created between him and Baker. The relation of trustee and cestui que trust results by legal operation against his will, 1 Johns. Ch. 205; 2 P. Wms 414. The result of this trust is, that he can do no act to the injury of Baker, or make any unauthorized application of his money, without liability to account to him, for all acts in which he did not acquiesce after being fully informed. 3 Sw. 81. The money was advanced for a special purpose, and with special directions how to appropriate it, it was applied to other purposes inconsistent with those directions, besides which, the defendant acted as agent for others, whose interests were opposed to Mr Baker, when it was his duty to have acted entirely for him, or to have renounced the agency, when he found it incompatible with his relations to others. His agency was limited, so as not to justify him in making any agreement to give a preference to any judgment, over those which were for the use of Baker, or to bind him to give any indemnity; he might use the money in his hands to effect the object, but when that could not be done, was bound to refund it. In October 1819, on the faith of the money received on Gardiner's bond, he promised to procure an assignment of certain judgments to Baker, and wrote him he had done it, whereas it appears that it was not done and the money applied to other purposes, by which Baker has lost land and money: this is a breach of trust for which he is answerable to the amount misapplied, with interest.

Mr Dunlap and Mr J. C. Biddle, for respondent.

The answer denies any agreement to procure an assignment of the judgments, and being responsive to the bill is evidence, unless disproved by two witnesses; it is not pretended to have been made when the 2800 dollars was given to the defendant in April 1819, nor was such pretence made till long afterwards. The receipt given for the money contained no such promise, the account rendered within four days afterwards and immediately received by Mr Baker, stated the amount paid on those judgments, and no objections made to it.

[Baker v. Biddle.]

In directing defendant to pay these judgments, he was not requested to procure assignments; this was an after-thought in October following; having once paid the money on them, they could not be revived, or be held for the use of Mr Baker so as to affect strangers; unless an assignment or entry for his use was made at the time of payment, they were satisfied and extinguished pro tanto. 1 Serg. & Rawle 399; 12 Serg. & Rawle 37, 41; 2 Rawle 128. After the payment in April, Mr Baker had no remedy under them by any subsequent act of defendant or the creditors, any undertaking of defendant in October, therefore, if made, was made under a mistake of the law, it was impossible to be performed so as to benefit Mr Baker, and its non performance was no injury to him; but if there was a breach of an agreement, and damages have been sustained, the court has no jurisdiction. No fraud is alleged in the bill, the plaintiff had a full account before it was filed, nothing new is disclosed by the answer or evidence, the agency was special, its execution was stated twelve years before suit brought, so that if the plaintiff has any cause of action, it is at law where his remedy is complete, it is therefore not a case for equity, 1 Pet. C. C. 356. The sale of the property appears of record, the sheriff is accountable for the purchase money, so that without any resort to equity, the plaintiff has ample means of information, and can have full justice done him at law; besides he has disavowed the acts of defendant, which is a denial of any trust existing between them, and if there is any money due plaintiff from the proceeds of the sale, he must look to the sheriff. This court cannot decide on the rights of the judgment creditors in state courts, the court which issues the process for sale, makes the appropriation of the proceeds, according to their judgment on the priority of the respective judgments. A purchaser at sheriff's sale, is not accountable to the judgment creditor for the purchase money, it is paid to the sheriff, who brings it into court or appropriates it according to their order, and the priority of the liens on record. 14 Serg. & Rawle 257.

The object of the plaintiff's bill, is to raise a trust by the purchase at sheriff's sale so as to make defendant accountable for a supposed balance, this is incompatible with any trust resulting from the receipt of the 2800 dollars, which was advanced for the purpose of preventing a sheriff's sale; they cannot, therefore, make out a trust for which defendant must account in equity. Being distinct transactions with distinct objects, they present separate causes of action at law, for acting either negligently in the execution of the agreement, or in

[*Baker v. Biddle.*]

violation of it, but neither transaction presents a case for equity. The defendant had accounted for the 2800 dollars before the alleged agreement to procure assignments; after the sheriff's sale, the priority of the judgment was no matter for account, or executory trusts, such as are alone cognizable in equity, there remained no act for defendant to do of which equity could compel the performance, it follows that the plaintiff's claim must rest in damages by a suit at law.

But were this a case for equity, the staleness of the demand after an account had been rendered twelve years, would be a sufficient reason for its rejection; *Jeremy* 548; this objection may be taken advantage of at any stage of the case; by the rules of chancery, and the twenty-third rule of the supreme court, we may set up any special matter in the answer, without demurrer or plea.

On the case made out by the plaintiff, his remedy is complete at law, which, by the sixteenth section of the judiciary act, bars the jurisdiction of a court of equity; here is no case for a discovery, as the plaintiff had full knowledge before filing the bill, so that no discovery was necessary; 4 *Wash.* 349; if there was any mistake, it could be corrected at law. 2 *Wash.* 129. Where the legal remedy is fully adequate to the object, the sixteenth section applies, unless there are some special circumstances to take the case out of it, 2 *Mas.* 270; 7 *Cranch* 69, as in some cases of dower, 7 *Cra.* 370, 376, the reforming a mistake in a contract, 4 *Wheat.* 115, or some defect in the remedy at law. 9 *Wheat.* 532. The want of jurisdiction is always open, a bill will be dismissed on this ground, after answer, 5 *Pet.* 503; it does not attach to a case of trust founded on mere allegation in the bill that there was a trust, or the receipt of money by one for the use of another, as a case for account. There must be some appropriate head of equity under which the obligation to account arises, *Jeremy* 504; 6 *Ves.* 140; 13 *Ves.* 131; 8 *Ves.* 193; 1 *B. C.* 194; 3 *B. C.* 137, and some defect in the law, 1 *Sch. & Lef.* 205; 1 *Ves.* 416; 1 *Ves. Sr.* 161; 4 *Brown's P. C.* 436; if assumpsit will lie, it is a case for law. *Cary* 135, 139.

Mr J. R. Ingersoll, in reply.

As the defendant has not pleaded, demurred, or set up in his answer the objection that the plaintiff has a remedy at law, it is now too late; the old practice was to plead it, then demur, or in the answer state that it would be relied on; *Gilb. Ch.* 220; *Bunb.* 29; it is too late to reserve it till the hearing, 2 *Johns. Cas.* 339, because it is an

[Baker v. Biddle.]

acquiescence in the jurisdiction of equity, and prevents plaintiff from proceeding at law, having the same effect as an agreement to go on and settle the account. 2 Cain. Cas. in Er. 40, 52; 1 Wash. 320. If there is no equity in the bill, defendant must demur, if the court has not jurisdiction, it must be pleaded, 1 Atk. 544; 13 Ves. 276, the objection cannot be taken at the hearing, 2 Vern. 483; 1 P. Wms 477; 1 Ves. Sr. 446.

The sixteenth section of the judiciary act is only declaratory of the common law, affirming and adopting the rules of the English chancery, so it has been held by the supreme and circuit courts. 2 Mason 270; 4 Wash. 204, 205; 3 Wheat. 221; 4 Wheat. 115; 3 Pet. 215. The twenty-third rule only waives a plea or demurrer, and gives leave to set up special matter in the answer. Equity has jurisdiction of all cases of account, though courts of law may have a concurrent jurisdiction, 13 Ves. 278; 13 Price 721; 2 Cain. Cas. in Er. 54; 10 Johns. Rep. 587; 1 Eq. Cas. Ab. 131, pl. 12; as on a devise to pay debts and make distribution, 4 Johns. Ch. 651, 659, cases of agency, as a supercargo, Paley Ag. 58; so wherever the relation of principal and agent exists, a bill lies for an account, though the agency is gratuitously undertaken, 4 Madd. Rep. 198, (374), 220, (417); it lies whenever an action may be brought at law to account, 5 Pet. 503, where there are mutual accounts, Paley 55; 1 Petersd. Ab. 98; 2 Show. 301; 1 Holt's N. P. 500, S. C.; 3 C. L. 172; so in all cases of money received for the use of another concurrently with assumpsit, Kirby 163, 164, to have an account allowed, 3 Johns. Ch. 351, and between landlord and tenant, 1 Sch. & Lef. 309. Equity has jurisdiction of all trusts which are variable and flexible, for the execution of which no action lies at law, or where the accounts growing out of it are complicated; 2 Atk. 612; 1 Atk. 128; it is concurrent with law where the trust is executed, but exclusive when it is executory, or there is an open subsisting relation of trust between the parties.

A plaintiff must show that the trust is executed, and a balance due, before he can sue at law for money had and received, 1 Holt's N. P. 500; 3 C. L. 172, n.; so wherever the transaction partakes more of confidence than contract. 5 East 449. Any person for whose benefit a trust is created, may come into equity, 7 Cr. 89, it gives relief on legal titles where deeds are suppressed, Hob. 109, it will continue to exercise its jurisdiction, though courts of law have recently given a remedy. 2 Swanst. 546, 580. Equity will

[Baker v. Biddle.]

sustain a bill against an attorney who acts for all parties, if he abuses his trust, 1 Sch. & Lef. 165, so to compel a solicitor to deliver papers, 1 Russ. 519, all trusts, though gratuitous and honorary, come within the cognizance of equity, whether they arise from agencies, or in cases of dower, partition, partnership, executors or administrators. 4 Johns. Ch. 651; 17 Johns. Rep. 384; 1 Fonb. 23, note F; 2 Atk. 60; 3 P. Wms 249; 5 Madd. 9; 3 Mason 347; 4 Wash. 349.

In this case the receipt of the money made defendant a trustee to whoever owned it, liable to an account as between principal and agent, the account was demanded and refused, the uncertainty of the arrangements made by defendant, the inaccuracy of defendant's statements, which required correction, the remedy at law being doubtful, attended with great delay if pursued, all which circumstances make it a proper case for equity. In sustaining this bill the rights of no third person will be affected, between the parties equity will consider that as done which defendant undertook to do by an assignment of the judgments; had this been done the plaintiff would have been in the situation of a surety, entitled to the benefit of such judgments, 1 Atk. 133, or of bail who pays money for his principal, 2 Vern. 608, though the suretyship was voluntary, as by indorsement. 2 Binn. 382; 2 Madd. Rep. 570. A judgment creditor who pays prior judgment with the intention of becoming the assignee, shall have the benefit of it, as such payment is no extinguishment when equity requires it to be kept alive. 10 Serg. & Rawle 404; 2 Rawle 128. As a surety Mr Baker had all the rights of these judgment creditors against the principal, 1 Johns. Ch. 412; 2 Johns. Ch. 554; 4 Johns. Ch. 121; 1 Gall. 32; 10 Ves. 412; 11 Ves. 22; 14 Ves. 162, it therefore cannot be relied on by defendant that Mr Baker shall have no benefit from the judgments of which he agreed to procure the assignments; that he was mistaken in point of law is no defence. 1 Peters 1, &c. Hence arises the trust, the money paid in April 1819 was to be refunded to Mr Baker out of the proceeds of the sheriff's sale, this was prevented by the conduct of the defendant, in consequence of which the original trust was revived, and not having been executed according to the agreement, we may enforce it in equity by claiming an account, and payment of the balance.

The objection founded on the lapse of time must be pleaded or insisted on in the answer, 2 Madd. Ch.; 1 Atk. 494; 6 Wheat. 497, as where the statute of limitations is relied on; its application

[Baker v. Biddle.]

by analogy is in the discretion of the court, here is no pretence of limitation as defendant has paid 1000 dollars within two years.

The opinion of the Court was delivered by BALDWIN, J.

The first question made in this cause is jurisdiction, which is an important one that ought to be settled to prevent its recurrence in other cases.

By the second section of the third article of the constitution, the judicial power of the United States is extended to all *cases in equity* between persons therein described; it also authorizes congress to establish inferior courts. In execution of this power circuit courts have been established by the judiciary act of 1798, with jurisdiction over all cases in equity, by the eleventh section, but it must be exercised within the limits prescribed by the organic law creating this power, and confined to the cases and subjects defined. 1 Cranch 173; 3 Cranch 172; 7 Cranch 32, 44, 108, 287; 1 Wheat. 337; 6 Wheat. 395, 604; 9 Wheat. 820; 12 Wheat. 117, 131, 203. By the sixteenth section of this act it is declared, that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." 1 Story 59. It has been decided by the supreme court that this section introduced no rule, but was declaratory of the common law, 3 Peters 215, so this court must take it; but we must give it the effect of a declaratory law, which is to declare it for the past and settle it for the future. Vide 4 Co. Inst. 87; Keb. Stat. 807; 2 Ruff. 539. "Whereas some question hath of late risen, whether &c.; for declaration whereof, and in avoiding such question hereafter, be it enacted and declared, That the common law of this realm is, and always was, and ought to be taken." Such is the form and effect of a statute declaratory of the common law, so taking the sixteenth section it is a proviso, a limitation and exception to the jurisdiction of the court, declaring that the case defined is not a suit in equity, cognizable under the eleventh section.

There can be no doubt of the power of congress to define what should be a case in equity, by declaring what the common law was which drew the line between courts of law and equity, nor that when declared it was obligatory upon all the federal courts, by superadding the authority of the legislature to that of the common law, so as not to leave the line of separation discretionary with the judges. To give any other effect to a declaratory law than settling

[Baker v. Biddle.]

a rule and standard for all cases coming within it, would annul it, for if it leaves the common law as it was before, doubtful or discretionary in any way with the court, it is to all intents and purposes a dead letter.

In looking to the seventh amendment to the constitution, proposed by congress at the same session as the judiciary act, their intention is most manifest to connect the sixteenth section with this amendment, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." By the adoption of this amendment, the people of the states and congress have declared, that the right of jury trial shall depend neither on legislative or judicial discretion. There were two modes in which this right might be impaired: 1. by an organization of courts in such a manner as not to secure it to suitors; 2. by authorizing courts to exercise, or their assumption of equity or admiralty jurisdiction over cases at law; this amendment preserves the right of jury trial, against any infringement by any department of the government, and the sixteenth section prohibits all courts from sustaining a suit in equity where the remedy is complete at law. Connecting this with the ninth section, directing the trial of all issues in fact in the district court to be by jury, with the twelfth, giving the same directions in cases in the circuit court, and the thirteenth in the supreme court, the judiciary act was intended to preserve a right deemed too invaluable and sacred to be left to any other guardianship than the supreme law of the land.

When congress intended to make an exception, it was declared, in the ninth section, "except civil causes of admiralty and maritime jurisdiction;" in the twelfth, "except those of equity, and of admiralty and maritime jurisdiction;" in the thirteenth, the provision extended only to "actions at law." It thus became necessary to define what were "suits in equity so excepted;" this was done by the sixteenth section, so that to bring a case within the exception, it must be, 1. a suit of equity jurisdiction; 2. a suit in which a complete remedy cannot be had at law, for if such remedy could be had, then it was a "suit at common law," within the seventh amendment.

This view of the constitution and law is the same as taken by the supreme court. "It is well known that in civil cases in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform

[Baker v. Biddle.]

the conscience of the court; when, therefore, we find the amendment requires that the right of trial by jury shall be preserved 'in suits at common law,' the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By common law they meant what the constitution denominated in the third article, 'law,' not merely suits which the common law recognises among its old and settled proceedings, but suits in which legal rights were to be determined and ascertained, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered, or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit." *Parsons v. Bedford*, 3 Pet. 446, 447. Taking the amendment, the law, and their construction as the one law, it follows, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a final judgment, which affords a remedy, plain, adequate and complete, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right of trial by jury. If the right is only an equitable one, or, if legal, the remedy is only equitable, or both legal and equitable, partaking of the character of both, and a court of law is unable to afford a remedy according to its old and settled proceedings, commensurate with the right, the suit for its assertion may be in equity. This distinction is strongly illustrated in a case on the occupying claimant law of Ohio, directing compensation to be made for improvements on land recovered by ejectment, to be ascertained by commissioners appointed by the court which tried the cause. The supreme court held the law valid so far as respected the right of compensation, but unconstitutional as respected the mode of ascertainment, inasmuch as the circuit courts of the United States, in a suit at law, must submit every question of fact to a jury. *Bank of Hamilton v. Dudley*, 2 Pet. 492, 525.

The tests of the relative jurisdiction over suits at law and equity are, 1. the subject matter, 2. the relief, 3. its application, 4. the competency of a court of law to afford it; their application is not to be regulated by the decision of state or foreign courts, where their judicial system is organised on principles wholly inconsistent with a federal government of limited jurisdiction in all its departments.

All the courts of the United States are of limited jurisdiction, which, whether appellate or original, must be exercised in the mode pointed out by the constitution, an act of congress directing a dif-

[Baker v. Biddle.]

ferent mode is void, 1 Cr. 175. Their jurisdiction is special, limited to certain cases, the facts necessary to its exercise must appear on the record, or their judgment is erroneous, as in inferior courts in England, 1 Saund. 174; 4 Ves. Sen. 204, though their proceedings are not nullities, because their jurisdiction does not appear, 5 Cr. 184, 185. An enumeration of cases on which the federal courts may act, is an exclusion of all others, 1 Cr. 174; 3 Cr. 172; 6 Cr. 313; 7 Cr. 32; 6 Wh. 603; 9 Wh. 820; 12 Wh. 132, a legislative exception from its appellate constitutional power, is implied from a legislative affirmative description of the powers of the court, 6 Cr. 314, if the law describes the power in general terms, embracing the case, without making any exception, it will be liberally construed and acted on, 1 Cr. 91; 6 Wh. 400, but a strict construction is adopted in other cases; 3 Dall. 324; 7 Cr. 110. These are the rules on which the supreme court acts, whether on an appeal, writ of error, or a certificate of division. 6 Wh. 363, 547; 10 Wh. 20; 12 Wh. 132. So as to the appellate jurisdiction of the circuit court, the time, the manner of its exercise, and its process must be subject to the absolute legislative control of congress. 1 Wh. 349; S. P., 7 Cr. 500; 2 Wh. 225. It cannot have been intended to leave the original equity jurisdiction, subject to different rules, or capable of being exercised in opposition to them.

State courts are organised on contrary principles; the supreme court of this state has all the powers of the court of exchequer, common pleas and king's bench; 1 Dall. L. 180; so has the supreme court of New York, 6 J. R. 280. In England the "king hath delegated his whole judicial power to the judges," "all matters of judicature according to his laws." 4 Co. Inst. 70, 74; Stat. 20, Ed. 3, ch. 1; 1 Ruff. 246. Hence the jurisdiction of the courts was general and supreme over all matters subject to their respective cognizances. That of the court of chancery, proceeding *secundum equum et bonum*, was original, not delegated, 4 Co. Inst. 73, 74, it is difficult to discover its origin, Mit. 1, it can be traced to no act of parliament, but had existed time out of mind, it had become very extensive, and being extraordinary, was governed by no certain rules. 4 Co. Inst. 89. It extends to all cases not taken from it, and transferred to some other court of equity.

Professing to act only in aid of the law in curing its defects, chancery adopted a general rule, not to interfere where the remedy at law was complete, but have not always adhered to it; the only test

[*Baker v. Biddle.*]

of jurisdiction being usage, they would not suffer it to be arrested because courts of common law gave the same relief. 3 B. C. 73, 224; 2 C. C. E. 40; 5 Ves. 784. Repeated attempts were made by the commons of England, to define and limit this jurisdiction "to such cases as have no remedy by the common law," but were defeated by the king's answer, "the usages heretofore shall stand so as the king's royalty be saved;" 4 Co. Inst. 82, 83. Chancery has thus been left to define its own jurisdiction, by its own usages and precedents, never giving up what it had once exercised, and struggling for its extension over cases cognisable at law; courts of law too, judging likewise of their own jurisdiction, have in modern times assumed the powers of equity, so that from their respective decisions, it has become difficult to draw the line between them, 2 Sch. & Lef. 690; 6 Ves. 86; 7 Ves. 18; 2 Eq. C. Ab. 382; P. C. 111, 244; 4 B. C. 296; 2 Ves. 122; 7 Mod. 43; 2 L. R. 785; 3 D. & E. 53, 151.

To avoid the confusion arising from this conflicting struggle for jurisdiction, between the different courts of common law and equity, congress vested the powers of both courts in the circuit courts, and did what the commons of England could not effect, prohibited their exercise of equity powers, in cases where the legal remedy was complete. Usage therefore is no test of jurisdiction in the federal courts, they cannot act (in the language of Buller, Justice), as the lord chancellor does "in the plenitude of his power," 3 D. & E. 161, but must proceed by the line drawn by the constitution, the law and the supreme court. It is no excuse for disregarding it, because courts of equity elsewhere act on another rule; as a matter of constitutional right, a defendant is entitled to a jury trial on an issue of fact in a suit at common law, and to his oath in his answer to a bill in equity, of which he cannot be deprived at the option of a plaintiff, 6 Ves. 184. It is enough for the purposes of justice, that one tribunal is open to every party, competent to give a remedy for every wrong; he ought to be compelled to resort to that which is appropriate to his case, and ask his remedy with the incidents attached to it. This court has been organised on this principle, with limited powers, it cannot sustain a suit at law on an equitable right only, adjudge a remedy appropriate only to equity, or sustain a suit in equity on a mere legal right, for which the law affords a complete remedy, 2 Cr. 444, this has been made our duty by a more imperative and safe rule than the usage or discretion of a chancellor.

[Baker v. Biddle.]

A case however may be sustained in equity on a legal right, if the object and nature of the remedy sought are equitable, 10 Ves. 14, the rights and rules of property are the same at law as in equity, the remedy for their violation is different; if damages are sought for a breach of contract, it must be by a suit at law, if a specific execution is asked, it must be in equity, so to annul and set it aside for fraud, 1 Wheat. 197. The right may be clear at law, but as a court of law cannot by assuming cognizance of the conscience act on the person of a party, 1 Ves. Sen. 446, if the remedy is doubtful, difficult, not adequate to the object, not so complete as in equity, 9 Wheat. 842, not so efficient and practicable to the ends of justice and its prompt administration, the sixteenth section does not preclude the jurisdiction of equity, 3 Peters 215. Nor where it is necessary to bring before the court, persons who are interested or actors in the case, though not parties to the suit, and cannot be made parties to a suit at law, 9 Wheat. 843, 844; where the competency of law falls short of the *equum et bonum* of the case, 4 Wash. 352; where there is some difference in the remedy, and some equitable circumstances calling for its application, 9 Wheat. 534, 535. But there must be some head or branch of equity jurisdiction under which the case comes, independently of the remedy being more complete, 4 Wash. 206; 7 Cranch 376; 9 Wheat. 842; 1 Ves. 423. In such cases equity acts to supply the defects of the law as to the remedy to which the party is entitled, and will administer its own appropriate relief by a final decree on the whole merits because cognizance cannot be effectually taken at law. 1 Sch. & Lef. 205.

When the jurisdiction of equity attaches, the extent of its exercise depends on the nature and object of the suit, if required only as preliminary, or auxiliary to a legal remedy, its power ceases when that is effected by the aid of equity; a subpoena in equity does not operate like a *capias* from the king's bench with a clause of *ac etiam*, or a *quo minus* in the exchequer, to draw from law, the cognizance of legal rights or legal remedies, when an auxiliary relief was alone called for, 3 Conn. Rep. 140, 170, or be abused as a pretext for bringing causes proper for a court of law into equity, 7 Cranch 89. A bill for discovery for instance, must present a case of defect of proof, 1 Wash. 129, and relief must be an incident or consequence of the discovery, or the party after obtaining it will be sent to law for his final remedy, 3 P. Wms 150; 2 B. C. 61; 1 B. C. 194; 6 Ves. 689; 3 Conn. Rep. 140, 170; equity will not render a final decree in a

[Baker v. Biddle.]

case of fraud, unless the object of the bill is to obtain something besides mere compensation, 3 Peters 221, nor on an injunction unless the object is to arrest the injury and prevent the wrong, 9 Wheat. 845, or on a bill for an account, unless the justice of the case appears on the account, 1 Sch. & Lef. 308, 309. If the question of discovery, fraud, injunction or account, involves the essence and merits of the whole case, as to right and remedy, and the court is competent to decide on the one and administer the other, it will, when put in possession of the materials to enable it to make a final decree, proceed to make it, to avoid multiplicity of suits, 3 Atk. 263; Amb. 541; 10 Johns. Rep. 596. So where a contract is made by fraud and imposition or the like, equity gives relief, which the law cannot, and having thus possession of the principal question, makes a final decree on the question and equity of the whole case, 1 Wheat. 197. The court being once rightly in possession of the whole cause, will determine the controversy, although in its progress it may decree on a matter which was cognizable at law, 5 Peters 278; 1 Cranch 89, but if the answer to a bill of discovery confesses nothing, furnishes no evidence in favour of a plaintiff's claim, and denies the whole equity of the bill, this ground of jurisdiction is totally withdrawn from the case, 7 Cranch 89, 90. The rule resulting from these cases is plain and intelligible, the principal question in a cause is the cause itself; a court of equity once having cognizance of it, would not send the party back to law to settle its incidents; nor if the incidents only are before them, would they take the substance of the controversy from law.

It was a well established rule of chancery before the American revolution, to sustain a bill for discovery where they could not give the relief prayed for; if the plaintiff was entitled to a discovery, and not to relief, the defendant must answer the former, and might demur to the latter, but a general demurrer was uniformly overruled, if the plaintiff was entitled to an answer to either, Mit. 148; 1 Ves. Sen. 248; 2 C. C. E. 176; 10 Ves. 553; 2 B. C. 281; 8 Ves. 2; 2 Atk. 44, 157, 284, 289; 2 Ves. Sen. 357. This rule was adopted in the United States and yet prevails; 2 C. C. E. 177; 1 J. C. 434, 435. It was changed in England in 1787, 1788, by lord Thurlow, and a new one introduced which has been followed since. That a demurrer if good to the relief, is good to the discovery, if the discovery is sought for the purpose of the relief, 1 Madd. Ch. 216; 10 Ves. 553; 2 B. C. 280, 319; a plaintiff is not entitled to discovery, if he

[*Baker v. Biddle.*]

goes on to pray relief to which he is not entitled, and a general demurrer is good to both, 4 B. C. 480; 2 Ves. 517; 3 Ves. 7; 6 Ves. 68; 11 Ves. 510. The only reason given for so important a change in chancery proceedings is, that it was a hardship on a defendant to pay the expense of a long copy, when there was only a right to a discovery, and not be able to avoid it by a general demurrer. 2 B. C. 281.

Trivial as the reasons are, the rule affects the jurisdiction of the court most materially; if a general demurrer is allowed they cannot proceed, if overruled they can act on the whole case, thus doing away the distinction between incidental and final relief, and the cases where the principal question is before them, the essence and substance of the case, or only its incidents or an incidental question. A similar reason has led to an assumption of equity jurisdiction in account, wherever the relation of principal and agent exists, in the case cited by the plaintiff's counsel, because a "plaintiff can only learn from the discovery of the defendant how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence: yet such must be the case if a bill for relief did not lie." 4 Madd. Rep. 199; Am. ed. 220; Eng. ed. 376, 416; 1 Madd. Ch. 217. It is an old rule of chancery that plaintiff pays the costs of a bill for discovery though defendant resists it, Bunb. 124; 1 Atk. 286; 4 Ves. 746, though Justice Buller ruled otherwise; 1 Ves. 423, yet it was never made a pretext for extending its jurisdiction till 1819. As costs are discretionary in equity, 1 Ch. Cas. 106; 1 Eq. Cas. Ab. 125; 2 Atk. 111; 1 Madd. Rep. 190, the justice of the case could have been better answered by altering the rule as to the costs, than to make jurisdiction and final relief a mere incident to costs. In the rule of lord Thurlow there is still less reason, for though the defendant pays the costs of a copy in the first instance, he charges it in his bill against the plaintiff. Costs in Ch. 106. Such are the pretexts for the assumption of jurisdiction when its extent and exercise depend on mere discretion, than which there can be no better reason for a statutory definition. Be the rule however as it may in England, or founded on solid or trivial reasons, it cannot be adopted by the courts of the United States; a check has wisely been provided against the assumption of equity jurisdiction by any new rule in English courts since the revolution, Vide 5 Peters 280, especially those which depend on the discretionary power

[Baker v. Biddle.]

of the court over costs. No such principle has been sanctioned by the supreme court in the cases cited by plaintiff's counsel, they have decided that the acts of congress distinguishing cases at law from those in equity, refer to the principles settled in England before their passage, and not to the practice in the state courts. 3 Wheat. 221 ; 4 Wheat. 115; 1 Peters 613. In the words of Judge Washington, the judiciary act adopts the long established principles of the court of chancery on the subject of equity jurisdiction ; 4 Wash. 205, 354 ; it follows that new rules subversive of established principles and practice are excluded. (Vide 7 Peters 274.)

It is contended by plaintiff's counsel, that the want of jurisdiction on the ground of there being a remedy at law ought to be by demurrer or plea, and comes too late after an answer.

As a demurrer admits the facts of the bill, and can introduce no new ones, it presents only the question whether defendant shall answer it, Mit. 86, 87 ; it denies the equity of the bill, as a demurrer to a declaration denies the cause of action, but at law the defendant may move in arrest of judgment, or assign error for the same cause, as the defect is not cured by verdict or judgment. 5 Peters 585.

There is no reason why a demurrer should be necessary in equity more than at law, it would be a hardship to compel the defendant in this case to admit the fact stated in the bill, that he undertook to procure an assignment of certain judgments to the plaintiffs, as the jurisdiction and relief might be consequent upon it ; whereas, by denying it in his answer, the plaintiff would be out of court if he did not prove that fact.

The difference between a demurrer at law and in equity is this, a judgment on a demurrer at law, if against a defendant, is final and peremptory, he puts it in at his risk, and the judgment is a perpetual bar ; if a demurrer is overruled in equity, the defendant must answer over, but may insist on the same matter in his answer, 2 Atk. 284 ; 3 P. Wms 94 ; 2 Ves. Sen. 492, being the same as a respondeas ouster at law, 1 C. C. E. 7 ; if the demurrer is allowed in equity, it is a bar and goes to the merits. 1 Atk. 544.

In general if a demurrer would hold to a bill, the court will not grant relief though the defendant answers, 6 Ves. 686 ; 2 Jac. & Walk. 151, it will be done in some cases, but they are rare. Mit. 87, New York ed.

The ground of a demurrer is, that the bill does not disclose a case which entitles the plaintiff to the relief prayed for ; if the bill does

[*Baker v. Biddle.*]

not state or the plaintiff does not make out such case at the hearing, or on an issue, or by the answer, he cannot have a decree; the want of equity in the bill is fatal to the plaintiff's relief; although a demurrer or plea might have availed the defendant, he is not precluded by answering, and the precedents to this point are numerous; 3 P. Wms 256, 257; 1 Ch. Cas. 144, 147; 2 B. C. 338, 340, 519; 4 B. C. 180, 198; 2 Ves. 56, 60; Com. 612; 1 B. C. 29, 201; 1 Atk. 451; 3 P. Wms 94; 2 Ves. Sen. 493; after plea overruled he may answer to the same matter, or set it up in a second answer after the first has been overruled. 2 Ves. Sen. 492. The rare cases referred to in Mitford are *North v. The Countess of Stafford*, 3 P. Wms 148, 150, where the lord chancellor allowed a demurrer, but said he would have relieved on the hearing if there had been no demurrer; this dictum applied to the particular case, the defendant had demurred to the relief and not to the discovery, and the plaintiff was at liberty to except, to amend his bill, and force defendant to discover. The others were the Rector of Skedington's case, and the case of *Pickering* referred to in a note of the reporter in *Brewster v. Kidgil*, 12 Mod. 171, in which it is said, that the difference between granting and refusing relief in the exchequer depended on there being a demurrer. As the case of *Brewster v. Kidgil* is reported in Holt 669; Carth. 438; Comb. 424, 466; 5 Mod. 368, 374; 1 Salk. 198, 615; 3 Salk. 340; 1 L. R. 317, 322, without noticing this point, little if any weight is due to this note of the reporter as evidence of a general rule, and his statement of the cases is too imperfect to ascertain their circumstances.

The counsel of the plaintiff relies upon a rule laid down by lord chief baron Gilbert, that after answering, a defendant cannot object that the plaintiff's remedy is at law; this rule however appears by the text and cases cited, to be applied to the cases of bills filed for relief on deeds, bonds, or other papers, which have been lost or destroyed. Gilb. Ch. 50, 51, 52; 2 Mod. 173; 1 Ch. Cas. 11, 231; 1 Vern. 59, 180, 247. These bills are of two descriptions. 1. Such as pray only for relief, auxiliary to a final remedy at law, by a decree for a discovery and re-execution of the deed. 2. Such as, in addition, pray for payment of the money due; in the former an affidavit of the loss or destruction is necessary, in the latter not; Mit. 42, 43; the reason of the difference is this, that if the matter of the bill is within the jurisdiction of the court, the plaintiff need not make affidavit that he hath not the writings, but if it be to give the court

[Baker v. Biddle.]

jurisdiction then he must. 2 Eq. Cas. Abr. 13, pl. 1 ; 2 Freeman 71, pl. 83. As a plaintiff cannot recover on a lost deed at law, it is a clear case for equity to supply the defect in aid of the law ; when this is done by a decree for discovery and re-execution, the power of equity is *functus officio*, for then the remedy is complete at law to enforce payment, and a demurrer admitting the loss admits the jurisdiction to supply the defect. But as a decree for payment takes the final remedy from law to equity, there must be an affidavit to give jurisdiction for payment ; if not made and the defendant denies the deed, he may demur, because he has a right to have it tried by a jury. If the deed is confessed in the answer, he cannot demur to the relief, as it is iniquitous to afterwards litigate it on an issue at law of *non est factum*, and he has nothing to do but to pay the money ; so if he denies the deed without demurring, and it is proved by two witnesses. Gilb. Ch. 50, 51, 52, 219, 220 ; Mit. 42. These principles are supported by the adjudged cases cited by Gilbert and 2 P. Wms 541 ; 3 Atk. 17, 132 ; 3 Anst. 859, 861 ; they apply however only to this class of cases, which are governed by appropriate rules, not interfering with those adopted in ordinary cases. The nature of a bill on a lost deed necessarily makes it an exception to the general rule, of which this case is an illustration ; for here it is admitted and cannot be controverted, that a demurrer would be good if the plaintiff has a complete remedy at law, 3 B. P. C. 525, whereas it would be overruled, if this was a bill on a lost bond with an affidavit annexed. In this case, as the answer admits or discloses nothing, which gives any jurisdiction independently of the allegations of the bill, the defendant is not put to his demurrer ; nor is the case in the bill one in which the plaintiff was bound to make affidavit, in order to give jurisdiction to equity, or where any affidavit if made to any fact set forth, would authorize a transfer of the final remedy from a court of law, if it was a case for law without such affidavit.

It has been thought proper to notice the rule in Gilbert the more particularly, as it was much pressed in the argument, and was the basis of the opinion of the judges in Ludlow v. Simonds, referred to hereafter. Admitting this rule as an exception in peculiar cases, we cannot hesitate in giving our opinion, that the established general rule of chancery is as laid down by lord Eldon ; “ if you could have demurred to the bill, the court will not make a decree at the hearing ;” the exception is, “ if the defendant has the vouchers, so that

[Baker v. Biddle.]

the plaintiff cannot go on at law, and then the observation applies, that wanting discovery, the court gives relief particularly in matters of account." 6 Ves. 686. Here the plaintiff asks for final relief, which must be denied him unless at the hearing he has made out a case of equity jurisdiction. It is next contended that this objection must be made by a plea to the jurisdiction of the court.

A plea differs from a demurrer in this, the latter is on the ground that the case is not cognizable in any court of equity, and can set up no new matter; a plea must set up matter not in the bill, some new fact as a reason why the bill should be delayed, dismissed, or not answered, or it will be overruled. Mit. 177, 179; Beame 2, 7; 2 Madd. Rep. 346, Am. edit. A plea to the jurisdiction does not deny the plaintiff's right, or that it is not a matter proper for the cognizance of equity, but that the court of chancery is not the proper one to decide it, Mit. 180; Beame 57, it admits the case to be of equity jurisdiction, but asserts that some other court of equity can afford the remedy. This must be shown by matter set up in the plea, because the court of chancery being one of general jurisdiction in equity, an exception must be made out by the party who claims an exemption in order to arrest it, Mit. 183; Beame 57, 91; 1 Vern. 59; 2 Vern. 483; 1 Ves. Sen. 264, but if no circumstance can give jurisdiction to the court of chancery, no plea is necessary, a demurrer is good. The objection that the case belongs to another court of equity cannot be taken by demurrer, it must be by plea, 1 Atk. 544; Mit. 123, 124; Beame 100, 101; 1 Saund. 74, showing what court has cognizance of the case, that it is a court of equity and can give the plaintiff a remedy. 1 Vern. 59; 1 Dick. 129; 3 Br. Ch. 301; 1 Ves. Sen. 203; 2 Ves. Sen. 357.

It is in the nature of a plea in abatement at law which cannot be put in after general imparlance, or received when it does not give the plaintiff a better writ, 1 D. C. D. 151, (146, 147); 1 P. Wms 477; Beame 92, 93; 1 Ves. Sen. 203, 204, the analogy however does not run throughout, lord Hardwicke says, in Penn v. Baltimore, "First the point of jurisdiction ought in order to be considered: and though it comes late I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering submits to the jurisdiction; much more when there is a proceeding to a hearing on the merits, which would be conclusive at common law: yet a court of equity which can exercise a more liberal discretion than common law courts, if a plain de-

[*Baker v. Biddle.*]

fect of jurisdiction appears at the hearing will no more make a decree than where a plain want of equity appears." 1 Ves. Sen. 446, S. P., 3 Atk. 589; Beame 56.

We have been much pressed with a contrary principle laid down by high authority, in *Ludlow v. Simonds*, 2 C. C. E. 40, 51, 56; 2 J. C. 369; 4 J. C. 290, but it is not supported by the cases referred to, and is much shaken by subsequent opinions of the same judges who asserted it. Vide 9 J. R. 493, by Mr Justice Thompson, who remarked, "This objection ought not to be very favourably received in this stage of the cause," by Chief Justice Kent, who does not notice this point in his opinion, 9 J. R. 505, and by Judge Spencer, who had previously given his opinion, that the bill ought to be dismissed, 9 J. R. 504. In 2 J. C. 369, Chancellor Kent rests his opinion solely on 2 C. C. E. 40, 56, in 4 J. C. 290, he repeats the rule as a general one, referring to 1 J. Cas. 434; 2 J. Cas. 431; 10 J. R. 595, 596, in neither of which cases is the rule referred to laid down by any of the judges. In *Ludlow v. Simonds*, Kent, J. quoted 1 Atk. 128; 1 Ves. Sen. 331; 3 B. P. C. 525; Mitford passim; Gilb. Ch. 51, 53, 219, 221; 1 Ves. Sen. 446, (a) neither of which support the position; hence he omits any reference to these cases in his two subsequent opinions in chancery, relying on the rule as one established in New York, by the case of *Ludlow v. Simons* which was decided in 1805.

In *Leroy v. Servis*, Judge Benson, in delivering the opinion of the court of errors in 1801, laid down the rule of chancery to be, "For

(a) The remark of Lord Hardwicke, that "answering submits to the jurisdiction," has been misapprehended as appears by the case as reported.

"The bill was for a specific performance and execution of the articles, what else was in the cause came by way of argument to support, or objection to impeach this relief prayed."

"The first objection for defendant was, that this court (of chancery) had not jurisdiction nor ought to take recognizance of it; for that the jurisdiction is in the king and council." 1 Ves. Sen. 444, 445. This objection, with others, which went to the jurisdiction, were considered elaborately, though they were not set up by the answer; the authority of this case is therefore in direct opposition to the position for which it is cited. The remark is consistent with the course taken, it is correct as a general rule, when applied to an objection to the jurisdiction of the high court of chancery, on the ground that an inferior court of equity has cognizance of the case; but it is not applicable to a case which is not cognizable in any court of equity, on account of the subject matter. With this distinction in view, this remark taken in connection with the whole sentence, the case before the court, and its course in its decision, is not only in perfect conformity with the cases which establish the principle laid down in *Baker v. Biddle*, but a direct affirmance thereof.

[Baker v. Biddle.]

it is to be remarked that a defendant does not waive or forego a single advantage as to the merits, or the point whether the plaintiff has equity, by not demurring. He may equally insist on the same matter by the answer, which he may have done by the demurrer; and if he should omit them in the answer, he may still avail himself in argument on the final hearing of the case. 1 C. C. E. 1, vii; 2 C. C. E. 176, 182. Decisive as are the terms of this opinion, it was overlooked in 1805, and a local rule to the contrary laid down, which we cannot follow when it is in opposition to the established course of equity.

The true rule as laid down by Judge Benson is analogous to proceedings at law, where an objection is made that the plaintiff's remedy is in equity. In *Paisley v. Freeman*, 3 D. & E. 53, the question whether an action founded on a fraud, could be sustained at law, was decided on a motion for a new trial; so in *Read v. Brackman*, whether a plaintiff could recover on a lost deed, was decided on a demurrer to the declaration for want of a profert; 3 D. & E. 152, 157; surely then a court of equity, which exercises a more liberal discretion in pleading than courts of law, will not hold a defendant to stricter rules on the question, whether the plaintiff has a remedy at law.

In the courts of the United States, an objection to the jurisdiction of the court, or to the want of equity in the bill, has never been overruled for the want of a demurrer or plea, but has been sustained wherever the defect appears by the bill, the answer, or the proofs in the cause; it may be made on a motion to dismiss the bill, 1 Pet. C. C. 363, 383; 2 Dall. 205, though the defendant answer the merits without taking this objection, 2 Cr. 419, 444; so after a decree pro confesso, a reference and report of a master, 5 Pet. 496, 504, S. P.; 6 Cr. 158; 7 Cr. 75, 89, 376; 1 Wh. 197; 3 Wh. 591; 4 Wh. 115; 9 Wh. 739, 842; 3 Pet. 211, 215. When urged in argument, the objection "is considered in the nature of a demurrer to the bill for want of equity, 1 Mas. 270; so a decree will be reversed for the want of proper parties, after a hearing on the merits in the circuit court. 4 Pet. 180, 202.

We must therefore take the law of equity to be settled, that a defendant may, at any stage of the cause, rely on the want of equity in the bill, on the ground that the plaintiff has a complete remedy at law. The nature of this case, which is one very near the dividing line between law and equity, required us to examine this question

[Baker v. Biddle.]

thoroughly, in order to come to a satisfactory conclusion on which side of the line it comes, as well as to settle the general rules of equity jurisdiction, so far as it could be done by this court. The labour of making up a detailed opinion is our own, the tax upon the time of the bar in listening to its delivery, is voluntary and comparatively small. It is enough for us, that the course we take is from the impulse of duty, of this we must be the judges.

The objects of the bill are threefold, first, discovery, second, account, third, the execution of a trust, they will be considered distinctly.

1. Discovery. From the bill it appears, that the plaintiff's testator had received from the defendant, two accounts of the receipt and disbursement of the 2800 dollars put into his hands, also of the amount of the judgments against Eckert, the sum bid at sheriff's sale, the purchase by defendant, the application of the purchase money, and that defendant had communicated his proceedings by letters received by the testator, which were read at the hearing. Thus far plaintiff having previous knowledge of all material facts had no need of a discovery.

The only matters disclosed in the answer, of which the plaintiff by his bill did not appear to have both knowledge and proof, were mostly of detail of what was in the accounts rendered, or would appear on the records referred to therein, in no way affecting the substance of the plaintiff's case in his bill. As the plaintiff had equal means of resorting to public records for information as the defendant, their contents are not a proper subject for a bill of discovery, as we decided in *Ross v. Gibson* at the last term. The merits of the plaintiff's claim were not changed by the answer, unless on matters merely auxiliary, or collateral to the principal question of relief, the answer has removed no legal impediment, or brought out any matters peculiarly within the knowledge of the defendant, so as to present a case of equity cognizance of any matter not cognizable at law; admitting the contrary, still equity can go no further than to supply the defects of law under this head. The discovery sought and made does not carry relief in equity as an incident, so as to give the court power to decree on the whole case, and take the controversy from law to equity, but leaves all questions as to a final remedy as open as before the answer. Vide 5 Peters 503; 7 Cranch 89; Mit. 27, 42.

2. Account. The bill does not aver any refusal to account till 1829, on the contrary it admits that one was rendered in April 1819

[*Baker v. Biddle.*]

and another two years before the death of the testator, exhibiting a balance due by defendant of 191 dollars and its appropriation, to which no objections were made as to the items, or the application of the money before the filing of the bill, nor is any fraud suggested. It is a good plea to an action at law for an account, that the defendant had accounted before suit brought, to the person from whom money had been received, or to the person to whom he was bound to account or directed to pay it, Bull. N. P. 127, or that the money had been received for an object which had been accomplished, 1 Vern. 95, 136, 208, or that he never was the plaintiff's bailiff or receiver to render an account, 1 D. C. D. 189; E. 3, 4, 5.

The object of the suit being to compel the settlement of the account, the plea of fully accounted is good at law, 4 Serg. & Rawle 44; 3 Wils. 113, and a stated account is a good plea in equity, 4 Cranch 309; 4 Dess. 175; 1 Atk. 1; 2 Atk. 1; Mit. 210, 211. If plaintiff has agreed to the account his only remedy is at law for the balance, unless there is some legal impediment, equity will not interfere when the sum is certain, 1 Ves. Sen. 160, 163; 6 Ves. 141. In this case the account must be considered as settled by its long retention, without objection made in a reasonable time, 2 Vern. 276; 2 Ves. Sen. 239, though not signed by the party it is a stated account, if it is in writing and shows a balance or that there is none, Mit. 21; 2 Atk. 251, 399. The burthen of showing errors in such an account, is on the person who receives it without objections, 7 Cranch 151, a settled account can be opened only for fraud or errors specified, and which are palpable or clearly proved, 2 Atk. 189; 4 Cranch 309; 1 Ch. Cas. 299; 1 Vern. 180; 2 Atk. 119; 9 Ves. 265; 2 J. C. 216; it can only be surcharged or falsified by the plaintiff, 11 Wheat. 256, and is not affected by being introduced into a subsequent account, 4 Cranch 316.

Long acquiescence in an account makes it a settled one, stale demands are not favoured in equity when the party acquiesces for a length of time and sleeps on his rights, 1 J. & W. 59, 62; 2 J. & W. 152; 2 Sch. & Lef. 627; conscience, good faith and reasonable diligence are required to call the powers of equity into action, 6 J. C. 369; Amb. 645; 3 B. C. 640; 2 Ves. 583; a trustee's account with an infant cannot be opened after eleven years' acquiescence in a settlement, unless by falsifying an item, 2 B. C. 62, an account is barred in eleven years; 2 Johns. Ch. 437; 3 Johns. Ch. 586. The bar from lapse of time is a conclusion from acquiescence, an inference from facts, which need not be set up by demurrer, answer or

[Baker v. Biddle.]

plea, but may be suggested at the hearing, 3 B. C. 646; 4 B. C. 268; 2 Ves. 87, 572, 582; 2 Sch. & Lef. 637, there is no fixed time when it operates in equity, it is applied by analogy to the statute of limitation, 10 Wheat. 149, 168; 3 Peters 52, 53, or rather in obedience to them as lord Redesdale expresses it, 2 Sch. & Lef. 629, 636; 2 J. & W. 191, the effect however is the same as at law, 7 Johns. Ch. 122. In this state six years bars an action of account, 1 Dall. L. 95, 96; an infant is barred from an account of rents and profits, unless brought in six years after he comes of age, P. C. 518; 7 J. C. 113, 114, and the same rule applies to an account of all trusts, which are not the peculiar creatures of a court of equity, 7 J. C. 114; 3 Peters 52; 2 J. & W. 147, 152, 191; 5 Peters 491.

We think this case comes within the spirit of all these decisions, the act of limitations has twice run over the plaintiff's claim, and being barred at law, we can see no equitable circumstance to take it out of the rule; the account must therefore be considered both at law and in equity as closed, so far as respects the receipt of the 2800 dollars.

The next ground for an account is an allegation in the bill, that the defendant undertook to procure an assignment of certain judgments against Eckert, to be made to plaintiff's testator; this is explicitly denied by the answer, and in our opinion the plaintiff has failed in doing away this denial (which is directly responsive to this part of the bill), though the answer was unsupported, Vide 5 Pet. 110, 111. The defendant also avers in his answer, that he acted not as the agent, attorney or trustee of the testator, in any capacity whatever; that what he did, was purely and solely to serve Eckert and family. It is then incumbent on the plaintiff, to make out the defendant to have become his bailiff or receiver, by something independent of the receipt of the 2800 dollars; if he has succeeded in this, another difficulty occurs. Admitting that the alleged agreement was made, its obligation was a legal one, and the remedy at law upon it, so far as we can perceive, complete. The evidence of this agreement was in writing in possession of the plaintiff, and connected with the answer, presents the whole case; no evidence has been given at the hearing which gives any new turn to it, or presents any matter for equitable relief on the ground that defendant was the bailiff or receiver of the plaintiff, in any thing but the receipt of the money for which he had accounted, and the account was settled by acquiescence. No change of circumstances could open this account

[*Baker v. Biddle.*]

for revision, all future accountability rested on the subsequent agreement, which related to the performance of certain acts, and cannot be carried back into the original account, so as to make the performance or non performance of the agreement, a matter of account. As a settled account cannot be opened directly, it cannot be done collaterally; the only pretext for it is, that defendant acted in both transactions as plaintiff's agent, consequently they make but one account, which cannot be closed without embracing the whole conduct of the defendant. The answer denying the agency not having been disproved, excludes the jurisdiction of equity, 7 Cr. 89; 3 Ves. 446, and the defendant has rendered a full account of both transactions, it was not to open the old account, or to attach any responsibility not existing when it was rendered, nor can the court give it that effect, for though a defendant does not demur but answers, it does not give the plaintiff a right to any relief, to which he is not entitled by his bill. 1 Pet. C. C. 363, 383; Mit. 87.

That part of the plaintiff's claim which grows out of the agreement in October 1819, is for damages for its non performance, not for money pretended to be actually in the hands of the defendant; the sole question is whether the money was applied according to the agreement, if it was, the plaintiff has no case on his own showing, if not, the amount misapplied is a mere matter of calculation, as easy for a jury as a master. To sustain a bill for an account; there must be a series of demands and payments, 2 C. C. E. 51, mutual dealings, 2 Johns. Ch. 171; 6 Ves. 139, 141; 9 Ves. 473, great complexity in the accounts, some doubt or difficulty in proceeding at law, or some discovery required, 5 Pet. 503; 6 Ves. 89; 10 Johns. Rep. 595; 2 Str. 733; 1 Ves. 424; 13 Ves. 278, 279, so that a court of law would not be competent to try it at nisi prius, and where the justice of the case depended on the account, 1 Sch. & Lef. 308, 309. The case must be one proper for an action of account at law, and involve an account, 5 Pet. 503; 2 C. C. E. 54, if the bill show a liquidated sum incapable of being entangled, it will be dismissed, as all difficulty of proceeding at law will be removed. 6 Ves. 688; 2 Rand. 450; 2 Cr. 444; 2 Mason 270; 4 Wash. 352. So where the facts are within the knowledge of plaintiff, and the answer confesses nothing, or furnishes no evidence to support the bill. 7 Cr. 89. So where the object of the bill is to recover damages for the breach of an agreement, and not its specific performance, Mit. 95; 1 Wh. 197; 3 Pet. 214, &c., or the plaintiff has a remedy by statute, 3 Atk.

[Baker v. Biddle.]

740. Different reasons are assigned for the jurisdiction of equity in account, by lord Redesdale, the difficulty of proceeding to the full extent of justice in courts of common law, Mit. 96, by lord Eldon, to avoid multiplicity of suits, 5 Ves. 687, by chancellor Kent, that it originated in discovery, 2 C. C. E. 52. Assuming either as the ground, neither exists in this case, there must be some appropriate head of equity jurisdiction under which an account must be decreed, 1 Mad. Ch. 89; 1 Ves. Jr. 424; 3 Conn. 141; 1 B. C. 194, it is not enough to charge it in the bill, to change the jurisdiction, it must be distinctly made out, 3 B. P. C. 525; 2 B. C. 340, 519; 1 Ves. Sr. 172; 1 Atk. 598; 1 Vern. 359; 2 Vern. 382, 386; 1 Ch. Cas. 144, 147, 184, or some ground of equity exist, growing out of the conduct of the defendant, 1 Br. Ch. 40, 201; 2 Coxe 362; 2 Mas. 417, 418.

There are cases affirming the broad principle that courts of law and equity have a concurrent jurisdiction in account, 13 Ves. 279, it has been carried so far as to embrace all cases of principal and agent, 4 Madd. Rep. 199, 220. So it has been held in late cases of dower, though they seem to be considered as exceptions, rather than as falling within the principle of concurrent jurisdiction, as the interference of equity is on the ground of discovery, the removal of legal impediments, or some equitable circumstance to regulate its exercise. 3 B. C. 630; 5 J. C. 488; P. C. 244, 248; 7 Cr. 376; 3 Atk. 130. The law had been explicitly laid down, that the chancellor had nothing to do in assigning dower, but in case of lands held in chivalry; 2 L. R. 785; 7 Mod. 43; P. C. 111; yet in 1793 lord Thurlow sustained a bill for dower, solely on the ground that the title was admitted by the answer, 4 B. C. 296; 2 Ves. 122. This was the establishment of a new rule abrogating an established one, and forcibly illustrating the gradual assumption of jurisdiction by the court of chancery, in cases which by the ancient land marks of the law were cognizable only at law. We cannot adopt these or other innovations as guides, but must consider them as beacons, in the administration of the equity jurisprudence of this court. We cannot adopt any rules or principles of the law, which are in contradiction to those which were settled and established before the revolution, 5 Pet. 280, nor extend our jurisdiction in account beyond the rules prescribed by the supreme court in 5 Pet. 503; they result from the provisions of the constitution and judiciary act, which cannot be affected by any subsequent adjudications of any courts in England,

[Baker v. Biddle.]

or in those states which adopt them. In the present case there is nothing in the nature of the agreement, or in the conduct of the defendant, which can give any equitable jurisdiction over it; nor does the defendant stand in that relation to the plaintiff, as to make him liable to a bill or action to account. He is neither bailiff, or guardian, and as the account is not between merchant and merchant, the plaintiff must make him out to be receiver before there can be a case for account. Co. Litt. 172, a; 2 Co. Inst. 379; Bull. N. P. 127. A receiver is one who receiveth the money of another to render an account, C. L. 172, but a party cannot have account of money in which he has no property, as if A directs B to borrow money from C to pay D, the account lies not by A, but D, Hob. 36, if defendant has paid over the money as a trustee, the trust is executed and an account does not lie, 3 Wils. 114, there must be a privity between the parties, continuing till suit brought; account lies not by an executor or administrator at common law for want of privity, it is given by statute, Co. Litt. 89, 90, 96; 1 D. C. D. 192. Here all privity arising from the receipt of the money, ceased on its payment to the persons directed, and rendering an account not objected to; there remained no subject matter to which the relation of receiver could apply at the time of the agreement, and as the money had passed from the testator for certain purposes, the property in it could only revest on their non performance. Dy. 22, b.

For these reasons we cannot sustain the bill under the head of account.

3. Trust. Where the legal right of property real or personal, is in one person for the use of another, there is a trust resting in confidence and conscience, on which a court of law cannot act, as it looks only to the legal right; hence a trustee is accountable only in equity, which acts on the conscience according to the justice of the case, 2 J. & W. 147 to 191. If a trustee gives a covenant to perform the trust, he is suable at law, 2 Wh. 56, if A assigns goods to B to sell and pay the proceeds to C, and B receive them without a promise to pay C, his remedy is in equity, if B promises to pay C, the remedy is at law; so if A consigns goods to B to deliver to C, and B accepts the consignment, or any agreement is made to perform the trust, 5 Pet. 594, 602, or the trust is executed, 3 Wils. 114, the right to the property is then a legal one. To give jurisdiction to equity, some part of the trust must remain unexecuted, some act remain to be done which rests in confidence; the mere relation between the par-

[Baker v. Biddle.]

ties of trustee and cestui que trust, is not enough, there must be that trust which is a creature of a court of equity, not cognizable at law, 7 J. C. 114, on which no action lies, but is only for the consideration of equity, 2 Atk. 612, which acts to carry into effect the principles of law where it provides no adequate remedy, and supplies its defects. 1 Mad. Ch. 450; 2 Sch. & Lef. 630; 4 J. C. 654. For the breach of all other trusts, an action lies at law, 1 Salk. 9; Wills. 204; it is a simple contract for which the remedy is personal, 2 Ves. Sen. 19; 2 W. Bl. 1269, 1272; wherever the money or property of another is held on a legal trust, the right being legal, the legal remedy is adequate. 1 B. & P. 286, 288; 2 B. & P. 279, 281; 1 M. & S. 714, 720; 7 Taunt. 403; 2 C. L. 154; 9 E. 378; 14 E. 590. So where there is a special agency, and the contract is closed wholly or as to any particular object, if the agreement, or its further execution has been ended by the death or act of the other party, it is a subject for law if the matters are distinct and can be separately executed. 11 Wh. 250, &c.

In considering the transactions between the parties, we can discern no right in the plaintiff resting in confidence; if there was any trust it was a legal one, the answer discloses nothing of an equitable nature, the case is one where any discovery would be merely auxiliary to law, to enable the plaintiff to recover damages for the breach of the agreement alleged to have been made. As matter of mere trust, any which has ever existed has been executed, so far as confidence was reposed in the discretion of the defendant; if we sustain this suit on the deposit in April 1819, it will be on the principle that every bailment is a trust involving an account in equity. If it is sustained on the alleged agreement in October, we assume equity jurisdiction in all cases of principal and agent, where one agrees to do an act or receives money or property for another, though there is a complete remedy at law to recover damages for the breach of the undertaking. Being satisfied that the plaintiff has not made out a case for the relief prayed for in his bill under the head of discovery, account, trust, or other appropriate branch of equity jurisdiction, the bill must be dismissed.

Circuit Court of the United States.**PENNSYLVANIA, OCTOBER TERM 1830.****BEFORE****HON. JOSEPH HOPKINSON, District Judge.****LESSEE OF LIVINGSTON AND NICHOLSON V. MOORE, MAHON AND OTHERS.**

The accounts between John Nicholson and the commonwealth, or some of them, were so settled and adjusted, that the balances or sums of money found due to the commonwealth, were good and valid liens on all the real estate of John Nicholson throughout the state of Pennsylvania.

The judgments rendered by the supreme court of the state in favour of the commonwealth against John Nicholson, also constituted good and valid liens upon all his real estate throughout the state.

The several acts of the general assembly of Pennsylvania, passed on the 31st of March 1806 and on the 19th of March 1807, are not repugnant to or in violation of the constitution of the United States or of Pennsylvania, but are good and valid laws, and a rightful exercise of the powers of the legislature of Pennsylvania.

THE pleadings in this cause continued for upwards of two weeks, after which Judge HOPKINSON delivered the following charge to the jury.(a)

(a) The notes of the judge of the arguments of the counsel in this case, being mislaid, we are obliged to omit the usual outline of them. If they should be recovered, the outline will be given in an appendix.

[Livingston and Nicholson v. Moore et al.]

The argument of this cause has been spread over a wide surface; and matters introduced into it, by way of illustration or otherwise, which have greatly increased its proper size and difficulties. The magnitude of the interests at stake, and the high principles which have been discussed, have excited extraordinary exertions from the able and distinguished counsel who have appeared before you. These are the rights and duties of the counsel. It is the business of the court to select from the great mass the matter most worthy of your attention, and to put it before you in as plain and simple a shape as it will admit of.

Such will be my object on this occasion; and I trust that both you and I will enter upon our duties, and endeavour to perform them, with a single eye to the authority of the laws, which we are bound to obey, and which we are placed here to maintain. If the state to which we belong has fallen into an error, and injured one of her citizens by an illegal and unauthorized act of legislation, it is here that the error must be corrected, or the wrong will be perpetual. On the other hand, we are not to deal lightly with the power and rights of a state; or to overthrow her most solemn acts in a spirit of wantonness, or in the indulgence of speculative theories and ingenious refinements. The facts of this case, supported by documentary testimony, are before us, with no contrariety in any thing material; and it is our duty to seek for the law which governs them, and so pronounce our judgment between the parties.

The title of the plaintiffs to the land in question is derived from J. Nicholson, who, in the year 1794, purchased it from the commonwealth. By an agreement made between the parties in this cause, it is stated that "as both parties claim under J. Nicholson, the title to the premises shall be admitted to have been in him, unless divested by the alleged lien and proceedings of the state of Pennsylvania." The defendants also claim title from the same J. Nicholson. They purchased their lands severally under the alleged lien and proceedings of Pennsylvania, and bought them from the state as the property of J. Nicholson; and "as and for such estate as the said J. Nicholson had and held the same at the time of the commencement of the lien of the commonwealth against the estate of the said J. Nicholson." By this clause in the act of assembly directing the sales, the original contract between the commonwealth and J. Nicholson is recognised and affirmed; his right and property in the lands admitted; and the commonwealth undertook to sell to the

[Livingston and Nicholson v. Moore et al.]

purchasers, the present defendants, only such estate as J. Nicholson held in them.

Both parties then claim to have the title and right in these lands, which J. Nicholson once held, and the question now to be decided is, which of them has made good his claim; which of them has proved and maintained his right by the facts of the case and the law of the land.

The original title being admitted to have been in J. Nicholson, his heirs, who claim immediately from him, have and hold his rights, "unless they have been divested by the alleged lien and proceedings of the state of Pennsylvania, under which the defendants have title."

This simple view of the case brings us at once to the question we have to examine, to wit: has the lien of the state on this property, and the proceedings of the state to enforce that lien, divested J. Nicholson and his heirs of the title and estate he once had in it; and have the title and estate of John Nicholson become vested in the defendants by virtue of that lien and those proceedings?

In pursuing this inquiry, our first step must be, to trace this lien and these proceedings from their origin to their termination; and examine whether they have brought these lands which J. Nicholson once held, lawfully and rightfully in the possession of the defendants, with all the title J. Nicholson had to them. If they have not done so, the defendants stand without title; they pretend to no other; the original rights of J. Nicholson in the land are unchanged by these proceedings, and the plaintiffs now holding those rights are entitled to recover.

We must turn a careful attention to some of the laws of the legislature of Pennsylvania, and settle their meaning and effect, before we consider the various acts that have been done under them. The foundation of the title of the defendants is found in the twelfth section of the act of the 18th of February 1785. It enacts that "the settlement of any public account by the comptroller-general, and confirmation thereof by the supreme executive council, whereby any balance or sum of money shall be found due from any person to the commonwealth, shall be deemed and adjudged to be a lien on all real estate of such person throughout this state, in the same manner as if judgment had been given in favour of the commonwealth for such debt in the supreme court." This act, 1. gives a lien in favour of the commonwealth upon all the real estate of any person who shall be found to be a debtor to the commonwealth, in any balance

[Livingston and Nicholson v. Moore et al.]

or sum of money, by a settlement of his account by the comptroller-general, confirmed by the executive council ; 2. this lien is to attach to the estate in the same manner as if a judgment had been given for the debt in the supreme court.

I have not been able to satisfy myself of the meaning of the legislature in this last phrase—"in the same manner as if a judgment had been given in the supreme court." It is true that at the time when this act was passed, a judgment in the supreme court extended its lien over the whole state ; but as the act had previously declared that the lien under it should be on all the real estate of the debtor, *throughout the state*, we must presume something more was intended by the subsequent clause.

The defendants contend, that by the words, "in the same manner," &c., the legislature intended that a purchaser under this lien should hold the land in the same manner as a purchaser under a judgment ; and have the same protection against a subsequent reversal for any errors in the proceedings antecedent to the lien. If this construction be the true one, it will greatly abridge our inquiries in this cause. It closes up all the objections of the plaintiffs to the settlement of the accounts ; and ratifies every irregularity, if there be any, prior to the lien. It therefore becomes necessary to examine, and, as far as we can, determine what was the meaning of the legislature in using these words, "shall be deemed and adjudged to be a lien on all the real estate of such person, throughout this state, *in the same manner as if a judgment had been given* in favour of the commonwealth against such person, for such debt in the supreme court." Did they mean to say, that a sale made under a lien, in such manner as might afterwards be directed, for this act made no provision for a sale, should have the same protection or immunity from errors, as was given by the law of 1705 to sales by execution under a judgment ? I have suggested already, that while the act of 1785 gives to the settlement of an account the effect of a lien by judgment, it provides no mode or proceeding by which the lien is to be enforced, or the money secured by it collected. I cannot but infer from this that it was the intention of the legislature to make the debt secure by the lien ; but that it was to be recovered and collected in the ordinary way of a suit, a judgment and an execution ; the settlement being conclusive evidence of the debt. If this be so, then as the sale would also be by a venditioni by virtue of the judgment and levy, the purchaser would of course receive the deed of the sheriff, and

[Livingston and Nicholson v. Moore et al.]

have all the protection given by the ninth section of the law of 1705 to such a sale. In this view of the act no provision was necessary for the security of the purchaser, and therefore none can be intended by the words in question.

Again, the lien is given in the same manner as if a judgment had been given in the supreme court. Now a judgment in the supreme court had no special privilege or rights in this respect; but a purchase under a judgment in any other court had the same protection from disturbance in case of a reversal of the judgment as if it had been rendered in the supreme court. On comparing the twelfth section of the act of 1785 with the ninth section of that of 1705, it will be found very difficult to connect them in the manner contended for by the defendants. By the law of 1785, the lien is put on a footing with a *judgment* and no more. Now the provision of the law of 1705 has no reference to the judgment, but the sale made by the sheriff, by virtue of the levy, condemnation and venditioni exponas issued from the court. It is the *sale* which is not to be avoided by a reversal of the judgment, but the purchaser is confirmed in his right and title to the land, and its former owner, the defendant, can demand a restitution only of the money for which it was sold. If the act of 1785 had authorized an execution to issue, on the settlement which in truth is the substitute for the judgment as regards the debt, or a sale to be under any process to satisfy it in the same manner as a sale under a judgment, the conclusion might have been fairly made that the purchaser at such a sale would stand as secure in his title as a purchaser under a judgment.

From 1785 to 1806, no provision was made to enforce the payment of the money secured by the lien in any other way than by a judgment and execution to be obtained as for any other debt. In 1806, an act was passed specially for the case of J. Nicholson, leaving the collection of the debts due from all other persons to the commonwealth, still to be made in the ordinary way. In the case of J. Nicholson, for reasons very apparent on the face of the act, the legislature provided a proceeding "for the more speedy and effectual collection of certain debts due to this commonwealth," by which, and another act passed in the following year, a sale was ordered to be made by commissioners as in the manner prescribed by the acts, of the lands of J. Nicholson, subject to the lien of the commonwealth. This sale differs in many respects from that authorized by the law of 1705, by virtue of a judgment and execution. The lands are to be

[Livingston and Nicholson v. Moore et al.]

sold absolutely, and not, as in the other case, only "where a sufficient personal estate cannot be found." No inquisition is to be held to ascertain the annual value of the land; and in other matters, it is wholly unlike a sheriff's sale; why then shall we say it is to have the effect of a sheriff's sale, in this particular, which effect is expressly given to that sale by the law which authorizes the sale in question? I am inclined to think this redundancy of expression is but a pleonasm which may occur in legislative compositions as in other works of the pen.

The full and perfect validity of this act has not been questioned, nor could be. Every government assumes and rightfully has the power to take care of its own revenue, to protect it by extraordinary securities, to collect it by extraordinary remedies. Without this power and a liberal exercise of it, the government might be thrown into ruinous embarrassments and distressing disappointments, and delays in meeting the expenses of the public service. The United States by an act of congress are entitled to a preference in certain cases over all other creditors, and even a judgment will not protect a creditor from the extraordinary right of the government for the payment of an ordinary debt.

We proceed then on the undisputed ground, that the state of Pennsylvania has taken to herself no illegal nor unusual advantage by the enactment of the twelfth section of the law of 1785, but that any balance or sum of money due from any person, ascertained and settled in the manner therein prescribed, "shall be deemed and adjudged to be a lien on all the real estate of such person throughout the state."

You have observed that the settlement of the account to which the lien is given, must be confirmed by the supreme executive council. This was in 1785; in the year 1790, the people of Pennsylvania made for themselves a new constitution, or form of government; and thereby the executive power of the commonwealth was vested in the governor, and the executive council of course ceased to exist.

Many acts of legislation became necessary to accommodate the laws of the state to the new government; among others to vest in the governor the power of the executive council. On the 13th of April 1791, a general act was passed which enacted that the governor of the commonwealth shall have and exercise all the powers that by any law or laws were vested in the supreme executive council. The duration of this act was limited to the 1st of August fol-

[Livingston and Nicholson v. Moore et al.]

lowing. On the 21st of September 1791, the act of April was continued to December, and in the law of September, we find the following provision, "that in all cases where accounts examined and settled by the comptroller-general and register-general, or either of them, have heretofore been referred to the executive authority, to be approved and allowed or rejected by the governor, the same shall *only*, for the future, be referred to the governor, *when the said* comptroller-general and register-general, *shall differ in opinion* : but in all cases *when they agree, only the balances* due on each account shall be certified by the said comptroller-general and register-general to the governor, who shall thereupon proceed in like manner, as if said accounts respectively had been referred to him according to former laws upon the subject. And provided also, that in all cases when a party or parties shall not be satisfied with the settlement of their respective accounts by the comptroller-general and register-general, or when there shall be reason to suppose that justice has not been done to the commonwealth, the governor may and shall, in like manner, and upon the same condition, as heretofore, allow appeals, or cause suits to be instituted as the case may require."

The meaning and construction of these provisions have formed a prominent subject of the discussion you have heard. It is my duty therefore to give you my views of it. We must go back for a moment.

By the law of 1782, great powers were given to the comptroller-general, in the settlement of accounts; and no appeal was allowed from his decision, or any means given by which a party aggrieved by his settlement could bring his case before the court and jury upon its facts or its law. To remedy this injury and injustice, the act of 1785 was passed. It enacts that wherever the comptroller-general shall settle an account in pursuance of the previous law and transmit it to the executive council for their approbation, if the party be dissatisfied, he may, within one month after notice given to him by the comptroller, appeal to the supreme court on certain terms not now material.

The sixth section of the law of 1785 directs that if the council be dissatisfied with the settlement made by the comptroller, they may direct a suit to be instituted against the party, with whose accounts they may be dissatisfied. This brief recurrence to previous laws will aid us in understanding the acts of September 1791, with one additional reference. On the 28th of March 1789, an act was passed

[Livingston and Nicholson v. Moore et al.]

for the appointment of a register-general, and the comptroller is required to submit all the accounts he shall adjust, before he shall finally settle them, to the examination of the register-general, and take his advice and assistance in making such settlement; and the settlements made by the comptroller with the aid and assistance of the register, are to be laid before the executive council. Afterwards by a law of April 1790, all accounts are ordered, in the first instance, to be submitted to the register, and after his liquidation and adjustment to be transmitted to the comptroller for his examination and approbation, who shall in like manner transmit them to the executive council for their *final approbation*. Thus we see that antecedent to the law of September 1791, the course of settling an account with the comptroller was: 1. To have it examined and adjusted by the register-general; 2. By the comptroller-general; 3. By the supreme executive council; and it was not considered to be a *final settlement* until it was examined, adjusted and approved by all these tribunals. All the rights of appeal by the party, and of a suit by the executive on behalf of the commonwealth, remained as they were given by the act of 1798.

We now come to the act of September 1791, and the changes effected by it in the settlement of public accounts. In the first place it enacts that the reference of the *accounts* to the governor, or executive power, to be by him *approved* and *allowed*, or rejected, shall in future only be made when the comptroller and register shall differ in opinion. When they agree the *accounts* are not to be transmitted to the governor, or in any manner referred to him for his approbation or rejection, but the register and comptroller are required to *certify* to the governor only the *balances* due on the one side or on the other on each account. It is, however, provided that if the party shall be dissatisfied with the settlement, he shall have an appeal in like manner and upon the same conditions as heretofore; and so on the other hand, if the governor shall suppose that justice has not been done to the commonwealth, he may cause a suit to be instituted against the party, and in either case the whole account will be investigated and recommended by a court and jury. But if the party does not take his appeal in the manner prescribed, and the governor does not cause a suit to be instituted, both the commonwealth and the party are presumed to acquiesce in the settlement made by the register and comptroller, and it is finally conclusive upon both.

Such was the law of the commonwealth for the settlement of pub-

[Livingston and Nicholson v. Moore et al.]

lic accounts, when the accounts of J. Nicholson, now before the court, was adjusted and settled.

We are now prepared to approach the question of *lien*. The right of a commonwealth to a lien on all the real estate, throughout the state, of any person for the sum or balance found due, being given by the law of 1785, we have to inquire whether such a balance or sum of money was found due from J. Nicholson to the commonwealth, in such manner and form as to give this lien to the commonwealth on all the real estate of J. Nicholson throughout this state for such balance or sum. In other words, were the accounts of J. Nicholson with the commonwealth so settled, according to the laws of this state, and the balances or sums alleged to be due from him so found, as to entitle the commonwealth to the lien given by the twelfth section of the act of 1785? Was there, on the 31st of March 1806, when the act was passed "for the more speedy and effectual collection of certain debts due to this commonwealth;" was there a debt due from J. Nicholson to the commonwealth; and was there a valid and subsisting lien on his real estate for the security and payment of that debt?

The defendants allege the affirmative of both these questions. And they rest their proof: 1. On the settlement of certain accounts of J. Nicholson in 1796. 2. On two judgments rendered against him by the supreme court of the state in favour of the commonwealth: one on the 18th of December 1795, the other on the 31st of March 1797.

1. The accounts.

Three having been laid before you, and they were produced by the plaintiffs in the opening of the case, I shall take them in their order of time.

1. An account which affirms on the face of it to have been settled and entered in the office of the comptroller-general on the 3d of March 1796, and in the office of the register-general on the 8th of March 1796. This account is headed, "Dr, John Nicholson on account in continental certificates with the state of Pennsylvania, Cr." You will have it with you; it is therefore sufficient for me to say, that on this account there is a balance struck against J. Nicholson of 58,429 dollars 24 cents.

2. An account "settled and entered" in the office of the register-general on the 20th of December 1796, and "approved and entered" in the comptroller's office on the 22d of December 1796, headed

[Livingston and Nicholson v. Moore et al.]

“Dr, John Nicholson on account in continental certificates with the commonwealth of Pennsylvania, Cr.”

The balance of the former account, 58,429 dollars 24 cents, is here charged to J. Nicholson, and credits are given to him which reduce that balance to 51,209 dollars 22 cents. This balance and the former contract is stated to be carried to account on new account.

3. An account which is thus vouched by the accounting officers : “Settled and entered, Samuel Bryan, register-general officer, 30th June 1800. December 20, 1796. N. B. This account was settled in December 1796, but not entered in the books till the 30th of June 1800. Also examined and entered, John Donaldson, comptroller-general officer, December 20, 1796.”

This account is headed, “Dr, John Nicholson, account three per cent stock of the United States, in account with the commonwealth of Pennsylvania, Cr.”

A balance is struck against John Nicholson of 63,729 dollars 86 cents, carried to the new account.

As the lien of the commonwealth, by which the defendants maintain their right, is in part alleged to have been created by those accounts and their settlements, they have properly attracted a particular attention from both parties, and been the subject of great part of the discussion that has been laid before you. The objections to these settlements, urged by the plaintiffs, are numerous, and I shall draw your notice to such of them as I think we may now consider. You have observed that one of these accounts has been brought before the supreme court of the state in the case of *Smith v. Nicholson*, reported in 4 Yeates 6. Such of the questions now raised as were clearly decided in that case, I shall not trouble you with ; I shall abide by that decision, not only on account of the obligation I am judicially under to do so, but because I am entirely satisfied with it. I speak of the law there settled. In that case the commonwealth claimed a priority over a private creditor of John Nicholson, who had taken in execution a tract of land as the property of Nicholson. The commonwealth maintained her claim by virtue of her alleged lien on all the real estate of Nicholson given to her by the law of 1785, on a certain settlement of *one of his* accounts, by which the sum of 58,429 dollars 24 cents, made on the 3d and 8th days of March 1796, was found due to the commonwealth. This is one of the accounts and settlements on which the defendants now rely. The question submitted to the court was, whether the said settle-

[Livingston and Nicholson v. Moore et al.]

ment created any lien on the real estate of John Nicholson. We must observe that this is the account which was first settled and entered in the books of the comptroller-general, and afterwards settled and entered in the books of the register-general, which is here insisted upon to be a fatal irregularity. It is also expressly stated that the accounts were not transmitted, and received no confirmation from the governor. These facts were then distinctly presented to the court, and their opinion given on the law of such a case.

1. That the account settled was but one of the various accounts between the commonwealth and the debtor.

2. That the settlement had been made first by the comptroller, and afterwards by the register.

3. That it had never been transmitted to the governor, or received any confirmation by him; and the question submitted to the court was, whether this settlement of their account created a lien on the lands of the debtor in favour of the commonwealth.

The court then decided :

1. That the provision in the law of 1785, which creates the lien, is not repealed by any subsequent law or laws, expressly or by implication.

2. That the settlement of the *account* before them, made in the manner mentioned, did create a lien on all the real estate of J. Nicholson throughout the state.

This decision is the law of the case as it was presented in the supreme court of the state, and no further. The party here, who was not a party to that suit, has a right to the benefit of any new facts which would vary the case, if there be any such. We must therefore consider such of his objections to the settlements as were not brought into view, and have not been disposed of by the judgment of the court in the case cited.

It is alleged that John Nicholson had a legal right to notice of the intended settlement of his account; that he had no such notice, and that therefore the settlement made by the accounting officers of the commonwealth was *ex parte*, and had no binding force on him or his property.

This allegation, as an affirmative fact that he had no notice, is not supported by evidence or admission, as it was in *Fitler's case*; but the case here is, that no proof has been produced that he had notice. We come at once to these questions. Was any notice necessary to give a legal validity to these settlements? May a no-

[Livingston and Nicholson v. Moore et al.]

tice be now presumed? Is there any evidence of it, which, at this distance of time, and under the circumstances of the case, ought to satisfy us that it was given, or that, what is equivalent to it, the party attended at the settlements?

One of the plaintiff's counsel has insisted that the notice directed by the fifth section of the law of 1782, which is in truth a process of summons, to be issued by a prothonotary and served by a sheriff, was such a notice as John Nicholson was entitled to. On turning to the act, it, to me, is extremely clear, that the notice there has no reference whatever to accounts which should afterwards arise and be settled with the treasury of the commonwealth. It applies only to certain accounts then, of long standing, and unsettled or not finally closed, with persons having in their hands large sums of money or effects belonging to the commonwealth, in danger of being lost, if "vigorous measures be not taken to compel such persons to settle their accounts, and discharge the balances which may appear to be due to the state." The comptroller is ordered to form lists or abstracts of the names and places of abode, &c. of such persons; and it is to them that the notice or summons is to be issued, to be followed by the subsequent proceedings, according to the act.

We recur to the question; was any notice required to be given to John Nicholson, of the intended settlements of his accounts? Certainly none is directed by the numerous acts of assembly which have been passed for settling the accounts of public debtors. It is nevertheless insisted that it is indispensable; and the opinion of the supreme court of the state is relied upon, *Fidler's Case*, 12 Serg. & Rawle 277, to prove the necessity of notices, although none may be expressly directed by the act under which an account is settled. The circumstances of that case were very peculiar, showing a strong and clear equity with the defendant, not merely in the point of notice, but in the substantial merits in controversy. Great wrong had been done him in the settlement, and it was admitted by the accounting officer: what is more material, there were many expressions and provisions of the acts under which his accounts were settled, from which the court thought it was "manifest the legislature intended, in such case, that the party should have been summoned, or in some way or other have had notice." The case decided by the court, was very different from this; it is an authority only so far as they are the same. In the acts of the legislature we have to construe, there are no such provisions as are found in *Fidler's Case*, from which the

[Livingston and Nicholson v. Moore et al.]

court inferred a manifest legislative intention of notice. Some general expressions of the chief justice, in delivering the opinion of the court, are resorted to to sustain the objection here ; such as that notice to the party, "is one of the most substantial requisites of natural justice ;" that "in proportion as power approaches to arbitrary discretion, it should be restrained within the limits prescribed to it by the legislature." Again, "the word *settlement* imports a joint act of the parties who have computed together ; and an *ex parte* settlement (if any thing properly be so called) is contrary to the plainest principles of natural justice." This is all true, and well applied to the case before that court, in which they thought that the proceeding of the accounting officer had not been "restrained within the limits prescribed to it by the legislature ;" but it would be a bold step in this, or any other court, to pronounce an act of a state legislature unconstitutional and void, on such general opinions and principles, however just in themselves ; and without going thus far, they will avail nothing for the plaintiffs in this case. If, therefore, it were here proved or admitted, that J. Nicholson had no notice of the settlements now charged upon him and his property, made by virtue of legislative acts, which it is admitted require no notice, I should not imagine myself to be authorized to pronounce the acts and proceedings of the legislature invalid ; for the argument, on the subject of notice, followed out, ends in this, if it is to serve the plaintiffs, that the acts of 1806 are unconstitutional and void, because they ordered the sale of the estate of John Nicholson, by virtue of a lien created by a settlement of his accounts, which settlement was made without notice to him, and therefore gave no authority to the legislature to pass the acts in question ; or that no lien was, or constitutionally could be created, by a settlement of accounts without notice to the parties, although the legislature had required no notice, and that such a settlement itself was illegal, and not binding on the party or his property. That is (supposing the notice not to be required by the laws), that the legislature has no power to direct a settlement of a debtor's accounts, nor to make the balance due on such a settlement, a lien on his property without notice. Granting this to be just ; is it a void act ?

. If the argument does not come to this conclusion, it does not help the plaintiffs. And can we soberly and judiciously bring it to this conclusion ? Can we solemnly pronounce a law of this state to be void, because a notice was not given, when none was required, by

[Livingston and Nicholson v. Moore et al.]

the power having the clear right to say whether it should be given or not? I might think notice to be a "substantial requisite of natural justice," but in a certain case, the legislature has thought otherwise; and they had a constitutional right to think so, and to act upon their own opinion of this abstract question, as well of its application to the case they were providing for. In *Fitler's Case*, the only question was, whether he should be charged with interest on the balance of his account, a question peculiarly within the equity of the court, and the opinions of substantial justice; that court was not called upon on such a point, to declare a law of the state void, and to prostrate it as an illegal assumption of legislative power. No court has yet presumed to question a legislative act, on the ground of a difference with their notions of natural justice; and no legislature would, or ought to submit to such a restriction of their authority. To affect the defendant's title, on this point of notice, we must declare that the settlement and the acts directing it, are unauthorized and void, because they give no notice, and therefore created no lien, and that the acts of 1806-7 are void, because they order a sale without settlement or lien.

If then the legislature had a right or a power to direct a settlement of the accounts of a debtor without notice to him, and they have done so, we might dismiss this objection with the remark, that however unjust we might deem it, yet as it violates no provision of the constitution, we cannot put the judicial veto on a law on this account. But I will proceed a little further with it. The counsel for the defendants have insisted, and are well supported by precedent, by principle and sound policy, in the administration of justice, that after a lapse of thirty-four years since these accounts were settled, a fair and legal presumption arises, that all was done which the law required to be done, or which ought to have been done, to give validity to the settlements; that it must be presumed, in the absence of all proof to the contrary, that the appointed and sworn officers of the commonwealth who settled the accounts, performed their duties with a proper regard to the rights of the other party; that the whole proceeding was regular and lawful. But allow me to call your attention to the evidence you have had of the circumstances which may at this time be considered as proof of notice or of the attendance and acquiescence of the party, John Nicholson.

It does not seem to be questioned by the plaintiffs, that slight circumstances might now be received as proof of notice; are there not

[Livingston and Nicholson v. Moore et al.]

such circumstances in this case? In the first place, we have the official certificates of the register and comptroller, that these accounts were "*settled*." If we may with the plaintiffs adopt the suggestion or allegation of Judge Gibson in Filler's Case, that the word "*settlement*" imports a *joint* act of the parties, can we refuse the same interpretation to the word "*settled*." If where the law directs a *settlement* of an account, it implies that both parties are to be present and acting in making it: when the officer certifies that it is *settled*, the same implication arises not only from the force of the term, but from the presumption that it was settled according to law. Again, the proofs of these accounts were in the hands of J. Nicholson, probably in November 1796; in which it is severally stated, that his account was "*settled*" in March 1796. If the term has the meaning now given to it, J. Nicholson had then an allegation by the accounting officers, that these settlements were by the said officers in conjunction with him, and he never denied the allegation, or the inference; but by taking, as it is asserted for him, these accounts as the basis of the judgment afterwards confessed by him, affirmed it.

On all these grounds I am of opinion, that this objection of the want of notice of the settlement of the accounts of J. Nicholson cannot avail the plaintiffs in this cause, or affect the validity of the settlements.

The case of Smith v. Nicholson decides, and I think very properly, that where the register and comptroller agree in the settlement of an account, the account need not be transmitted to the governor for his confirmation or revisal; of course I make no further answer to this objection: but it is argued that if this be so, yet in all cases the balances must be reported to the governor by whom the appeal is to be allowed and certified. This is true, and no such point was brought to the view of the court in the case just mentioned. The reason is obvious, the question then was, as it now is, as to the lien of the commonwealth, and which lien was given by the law of 1785, on and by the *settlement* of the account, and was full and complete when that settlement was full and complete, which it was on the agreement of the register and comptroller. When the further confirmation of the governor was necessary to the *settlement*, then the lien did not attach until that confirmation was obtained; but no act of the governor being necessary to this settlement, it at once created the lien; subject it is true to such alteration in the amount secured by it as on appeal might be found due, but if no appeal was taken, it stood for

[Livingston and Nicholson v. Moore et al.]

the balance found by the register and comptroller on the settlement of the accounts. This answer also will meet the objection that these accounts were not entered in the books ; although those produced are certified by both officers to be entered. The entry either of the whole account or the balance is no essential part of the settlement ; on the contrary, the account must be settled and finally, unless appealed from, before it can be entered.

It has been strongly argued that the balances must be in money, not in stock, certificates or other effects. For this I can only look to the accounts themselves, which profess to give money balances in dollars and cents. I believe no continental certificates, or certificates of stocks, were given for dollars and cents. If in this I am correct, it is clear that in stating the accounts and striking the balances, the stocks had been valued and reduced to money.

It is said that the order of settlement by the accounting officers has been reversed. There might be some embarrassment on this question, if it were material ; but as accounts have been produced, settled in both ways, and any one is sufficient to give a lien to be the foundation of the subsequent acts of assembly, we need not stop to examine this objection more particularly ; we are not now settling the accounts, nor inquiring which of several has given a legal balance ; but whether any account has been settled so as to give a lien to the commonwealth, under the provisions of the law of 1785.

Besides the objections to these settlements by the force of which it is maintained that they created no lien in favour of the commonwealth, it has been argued that if such lien were given by them, it was afterwards lost by the judgment entered for the same debt in March 1797, rendered in a suit brought against J. Nicholson, in the supreme court of the state to September term 1795.

This was antecedent to the settlements. The argument is that the commonwealth had two modes of proceeding, to secure and recover moneys or effects due to her. 1. The ordinary proceeding by a suit in one of her courts, regularly prosecuted to judgment. 2. By a settlement of the account of the debtor, and the lien thereby created for the balance found due. That she could not have or use both at the same time, and in this case having made her election to proceed by suit, she can claim nothing by the settlement. It has been further strongly urged by the last counsel, in connexion with this point, that the two claims are here inconsistent, for that while the suit demands the certificate, and stock as the *property* of

[Livingston and Nicholson v. Moore et al.]

the commonwealth, the accounts, by charging him with their value, consider them as the property of J. Nicholson. The declaration is produced to show this understanding of the case. This is very much a technical view of the proceeding. But this is not the only answer or explanation of it. When the suit was brought, and the declaration has reference to that period, the account had not been settled, and the certificate and stock were really the property of the commonwealth, in the hands of the defendant. More than a year afterwards the accounts are settled between the parties, and a value is given to the certificates and stock which had been claimed in the suit, and he is charged with them at their money value. Then they become the property of J. Nicholson, and he becomes indebted to the commonwealth for the value; the account is accordingly so settled, with all the legal effects of the settlement. At the next meeting of the court, in March 1797, when the cause is called for trial, a judgment is given and taken for the money value, previously accorded to the certificates and stock: and the result of the whole operation is, that the commonwealth has a settlement, lien and a judgment at the same time, against the same person for the same debt. If there is any thing illegal or unusual in this, it is unknown to me. Are not the instances without number, in which a party is allowed to have two or more securities, and two or more remedies for the same object or debt, which he may prosecute sometimes together and sometimes successively without impairing either? If the judgment did merge and destroy the lien; could it do so without becoming its substitute and as fully serving all the purposes of the defence? To avoid this conclusion, the plaintiffs have made an extraordinary effort. They argue at one time that no lien can be claimed by virtue of the settlements, because neither the commonwealth nor her accounting officers, had any such expectation or intention: and the judgment of March 1797 is invoked to demonstrate the truth of this allegation. At another time they argue that the commonwealth can have no advantage in these sales from the lien of her judgments, because the legislature had no such expectation or intention, but looked altogether to the settlement liens. By this ingenious process of reasoning, the commonwealth is made to destroy her own rights, by her own *intentions*; and it is not the least remarkable feature in the argument, that she has done this by the very acts by which we may say she supposed she was strengthening and securing those rights. In 1797 she abandoned the settlements

[Livingston and Nicholson v. Moore et al.]

to rely upon her judgment: and in 1807 she abandoned the judgment to resort to the settlements which she had surrendered and lost ten years before.

If the defendants are to be deprived of the liens of the law of 1795, they then go to the judgments obtained by the commonwealth against J. Nicholson, as sufficient to support the sales ordered by the acts of 1806 and 1807, and their titles derived from those sales. And why are they not? Why are these judgments not such liens as satisfy the provisions of those acts and afford a foundation for the proceedings thereby directed? The only pretence set up by the plaintiffs against them is, that the legislature did not intend it, with a reference to a section in one of the acts which relates to a dispute with the Asylum Company, to support the allegation. Can I say that the legislature did not intend to exercise all the rights which these judgments gave to the commonwealth? Can I say, by a forced and remote inference, that they intended so great a wrong to the interests they were bound to protect? I turn to the acts for this intention, and do not find it any where declared or expressed. I find no abandonment of any right the commonwealth had against J. Nicholson or his property, for the recovery of the debt he owed to her. The language of the acts is of sufficient comprehension to include the liens by the judgments—indeed as fully and clearly as the liens by the settlements—and there is no more exception of the one than of the other. The various provisions of these acts relate to the lands of J. Nicholson, subject to the *lien* in one act, and to the *liens* in the other, of this commonwealth. I look in vain for any reason, legal or logical, to induce a belief that the legislature, in their acts of 1806 and 1807, intended to relinquish the lien which the law gave them upon the lands of J. Nicholson, by virtue of the judgments against him.

If the law of 1785 is a good and valid act of legislation, and if, either by virtue of settlements made of the accounts of J. Nicholson, or by the judgments rendered against him at the suit of the commonwealth, there was in 1806 a legal and subsisting lien on all his real estate within the state, the only remaining question is, whether the acts of 1806 and 1807, or such parts of them as are necessary to the title of the defendants, are valid and constitutional laws, or whether they violate any of the provisions of the constitution of the United States, or of the constitution of Pennsylvania, and are so inconsistent with them, or either of them, that it is the right and duty

[Livingston and Nicholson v. Moore et al.]

of the court to declare them to be null and void. The power and right of the court to do this has been freely admitted by the counsel on both sides; indeed I do not see how it is possible to doubt it. If we are bound faithfully to administer the law of the land, if it is our duty to give to every suitor the rights he is entitled to under that law, it follows that it is our right and duty to seek for that law in the declared will of the people, who alone have the power to make it; and if in this search we find conflicting acts, both professing to be the will of the people, we must yield submission to the greater or paramount law, and disregard the inferior.

That the constitution is that paramount law, and that acts of legislation are subordinate to it, cannot be denied, and the consequence is, that where they cannot be reconciled, where both cannot be executed, the courts, when called upon to declare the law, must give effect to the constitution, and annul the act which would violate and defeat it. This is, however, a high exercise of power, and should always be attempted under a deep sense of the responsibility assumed by the court, with a profound respect for the legislative body, and anxious desire to give effect to both acts, if they can be reconciled. The incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases or supposed consequences. It must be clear, decided and inevitable, such as presents a contradiction at once to the mind, without straining either by forced meanings or to remote consequences. It is the constitution that must be violated, and not any man's opinions of right and wrong, or his principles of natural justice. These are uncertain standards of legislative power, and must be referred to the discretion of those to whom the people have given that power, and to whom they must answer for an abuse of it. Under the direction of these principles, I approach the constitutional objections that have been made to the acts of the legislature of Pennsylvania of 1806 and 1807, and shall give to them a distinct and separate consideration. They are charged with oppression, injustice, partiality, an injurious departure from the ordinary modes of proceeding, and a total disregard to the rights and interests of others, in the pursuit of the rights and interests of the state. If all this were true, there may nevertheless be evils for which we are not authorized to administer a remedy; there may be injuries we cannot redress, and errors we cannot correct; our power over the subject is measured to us by the constitution, and we must take care that in our zeal to redress real or supposed wrongs, we do not commit a

[Livingston and Nicholson v. Moore et al.]

greater wrong. If we agree that the state of Pennsylvania has exercised her authority with a strong arm and a selfish spirit, if she has been a hard creditor, still this will not bring us to the point where we may array the federal power against her acts, and demand of her to surrender the advantages she has thus obtained. If the authority she has exercised be her right, we have no control over the manner in which she may choose to use it. It has been more than once urged upon you that it is the liberal and humane policy of Pennsylvania to postpone the payment of debts due to herself, and to pay individuals first. There is such a provision in the law of 1794, directing the order for the payment of the debts of a decedent by executors or administrators; but does this furnish a rule for any other case? Has it ever done so? If by a general law (not the constitution) debts due to this commonwealth were in all cases to be paid last, would this take from the legislature the power either to repeal the law altogether, or to alter it in a special case for reasons thought by them to be sufficient, which would be a repeal pro tanto? Other states claim a priority in all cases, and can it be unconstitutional or unjust in the legislature of Pennsylvania to do so in a very peculiar case, taking upon themselves to judge of the reasons.

The acts in question are alleged to be illegal:

1. Because they authorize a sale of the lands of the debtor without a previous *inquisition* to ascertain whether their rents and profits would not pay the incumbrances on them in seven years. We ask, what is the right of a debtor to this *inquisition*? How does he derive it? Assuredly not from the constitution, nor from those natural and eternal principles of justice which have been so often mentioned. It is the gift of legislative indulgence, a mere gratuitous benevolence to the debtor in derogation of the rights of the creditor, who on strict principles of justice ought to have his money immediately—ought to be allowed to make his debtor's property available to pay his debt without delay, and not be compelled to take the possession and care of an estate he does not want, and wait for its slow and uncertain proceeds for the payment of a debt which, by the contract of the debtor, was to have been discharged long before. This right is by no means so sacred as has been supposed, nor a resumption of it so unusual. The legislature has not hesitated to withdraw it when they thought the public interest required it. Lands are sold for taxes without an *inquisition*, and by a very summary process, and this has never been deemed illegal or oppressive. Further, the

[Livingston and Nicholson v. Moore et al.]

courts of the commonwealth have taken upon themselves the authority to dispense with this proceeding in many cases in which they believed it would be useless, as in cases of levies on unseated lands, on vacant town lots, on uncertain estates in land. It would be strange to say, after such precedents, that the act of 1807 is unconstitutional and void, because it orders a sale of J. Nicholson's land without an inquisition, or even to complain of it as unusual, oppressive and injurious, especially as, so far as we are informed of the situation of these lands, the inquisition would not have been necessary for a sale under a judgment and execution. Who has been injured, who oppressed by this proceeding?—(I mean the omission of the *inquisition*). Neither J. Nicholson nor his creditors. On the contrary, a great and useless expense has been avoided, which would have consumed no inconsiderable portion of the proceeds of the sales to the loss of J. Nicholson and his creditors.

As connected with this part of the argument, I will now remark, that the sales by the commissioners instead of by the many sheriffs of the many counties in which the lands lie, has the same effect in saving expenses and charges which would exhaust the fund. It is replied that the state has saved perhaps *five* per cent by giving *ten* to the commissioners. But it must be observed, this ten per cent was paid by the state out of her moneys and constitutes no charge upon J. Nicholson or his creditors.

2. The want of a public notice of these sales, has been urged against the legality of this act; and this is presumed because no proof of notice has been given. I cannot allow the inference. By the express enactment of the law, the deed of the commissioners is declared to be *prima facie* evidence of the grantee's title, and of course of the regularity of their proceedings. If there was not a provision of the law, I should certainly, in the first instance, presume, at this late day and under the circumstances of the case, that the proceeding had been regular, and the notice required by the act given. The legislature provided liberally for this notice; much more so than the debtor would have been entitled to, if his land had been sold under the executions. In that case the notice of the sale would have been "by so many writings upon parchment or good paper, as the debtor shall reasonably request to be put up in the most public places of the *county* at least *ten* days before the sale." By the act of 1807, it is ordered that "in all cases of sales to be made by the commissioners, at least *twenty* days notice shall be given of the time and place of

[Livingston and Nicholson v. Moore et al.]

sale, by advertisement in the newspaper printed in the county where the lands respectively lie, if any be there printed, and if not, in the newspaper printed nearest to such county, and also in two papers printed in the city of Philadelphia." The notice here directed is similar to, if not the same, with that directed of sales of unseated lands for taxes.

3. The power given to the commissioners to make compromises with persons who may allege title to any of the lands, has been vehemently complained of, and even declared to be unconstitutional. What is the ground of this complaint and charge? How is this an unconstitutional grant of power? Does the state assume any right that any individual would not possess in like circumstances? When about to sell a tract of land as the property of J. Nicholson, to satisfy a debt due by him, a third party sets up a claim to the land. Instead of encountering the trouble, expense and delay of litigation to decide this question, the state offers a compromise, and authorizes the commissioners or agents to arrange the terms of the compromise, and to bind her finally and conclusively by their decision and agreement; "their proceedings shall be final and conclusive upon the commonwealth," not upon John Nicholson or his creditors, who have not the most remote interest in this proceeding. It is an arrangement and contract, in its terms, in its object and in its effect, wholly between the commonwealth and the claimant of title to the land; it touches no right of J. Nicholson or his creditors; it deprives them of nothing, and makes no change in their condition or relation to the land, to each other, or to the commonwealth. As respects the rights of J. Nicholson and his creditors, every thing remains as before.

When a compromise is effected, what are the commissioners authorized to do? "To execute and deliver an assignment of *so much of the liens of the commonwealth* against the estate of J. Nicholson as may be equivalent to the consideration paid; and the holders of the assignment "may at any time proceed upon the liens to sell the lands which were the subject of compromise." Was not this an assignable right or interest; and when assigned, would not the assignee hold all the rights of the commonwealth in the subject assigned, and no more? Whatever objections of law or fact J. Nicholson or his creditors could have opposed to this lien or any proceeding under it while it remained in the hands of the commonwealth, they could oppose with like effect to the assignee holding from the commonwealth.

[Livingston and Nicholson v. Moore et al.]

The purchaser of the lien stands precisely in the place of the state, with no greater rights than she had, and no greater wrong to J. Nicholson or his creditors. The only difference is, in case of a controversy they will have an individual instead of the commonwealth for their antagonist. Is this complained of as an injury? What provision or principle of the constitution is violated by it?

While the objections to these laws we have just considered were charged to be violations of the constitution, the charges were left on the general allegation and argument, but no attempt was made to designate the articles or provision of the constitution which it was supposed were violated. On some other points the counsel for the plaintiffs have been more specific in their objections under this head, and have referred us to parts of the constitution of the United States and of Pennsylvania, which they allege to be infringed. They assert that these acts impair a contract, or the obligations of a contract. That they take away the trial by jury and deprive a citizen of his property without the judgment of his peers. You are familiar with the parts of our constitution to which these allegations refer, and it is unnecessary for me to recite them. We proceed to inquire what contract or obligation of a contract has been impaired by these laws or either of them? The plaintiffs have mentioned two: 1. The original contract between J. Nicholson and the commonwealth for the sale and purchase of the land. 2. The contract or agreement made between them when the judgment was entered against him in the supreme court of Pennsylvania. 1. The contract for the purchase of land. The argument is that John Nicholson had by his warrant, survey and the payment of money to the commonwealth acquired an equitable or inchoate title to these lands, and that the commonwealth had bound herself to complete this title by delivery to J. Nicholson of a legal deed of conveyance, but that by selling these lands under the laws in question, she had put it out of her power to complete or perform this part of it; and thereby has virtually violated it. Let us consider whether by these laws the commonwealth repudiated any right she had given to John Nicholson by her contract with him; and whether she had disabled herself from doing any thing she was bound to do by that contract. What had she done? She had vested in him the property of these lands; he had legally acquired the property in them. Does she deny it, or resume it by these acts? By no means; on the contrary, all the proceedings directed by these laws are founded on the basis that the lands are

[Livingston and Nicholson v. Moore et al.]

the property of J. Nicholson, and *as such* liable to the liens of the commonwealth. What says the first act on this point? The commissioners are ordered to procure copies of deeds and other writings relating to the *real estate* of John Nicholson, to ascertain the quality of the estate of John Nicholson, subject to the lien of the commonwealth. Through every section of this act the lands to be sold under it are invariably spoken of and described as the estate or property of J. Nicholson. So of the act of March 1807. The governor is to issue process to the commissioners to sell such lands as they may specify “as the property of the late John Nicholson.” The purchaser is to receive a deed for the property sold to him “as and for such estate as the said J. Nicholson had and held the same at *the time of the commencement* of the liens of the commonwealth against the estate of the said John Nicholson.” A scrupulous regard is here paid to the right of any citizen who may have acquired any right in these lands from John Nicholson between the period of his purchase from the commonwealth, and the commencement of the lien, a space of more than two years. The original contract then, it is evident, was unaffected, nay it was in terms affirmed by the laws of 1806–7. Did these impair her further undertaking to give a deed or patent for the premises? In the first this undertaking was not absolute, but depended on contingencies or things to be further performed on the part of the purchaser. But let that pass? Can it be denied that the right of property which John Nicholson had in these lands was such as he might alienate and transfer to another? that it was such as might be taken and sold by process of law for his debts, and that his alienee or the purchaser at a sale for his debts would acquire all his interest, all his title, and all his right to any further assurance of title. This part of the contract of the commonwealth is neither violated, impaired or diminished by the passing of the land from John Nicholson to any other person, but it follows and sticks to the soil, and becomes vested in any and every legal owner of the soil. The sale under the law of 1807 manifestly has no more effect upon the obligations of the commonwealth to complete the inchoate title sold to John Nicholson in 1794, than if the land had been assigned by John Nicholson to a bona fide purchaser, or sold under a judgment and execution from one of the courts of the commonwealth.

We will now briefly inquire how these acts violate or impair the agreement made at the time when the judgment was entered, in March 1797. This agreement we have on the records of the su-

[Livingston and Nicholson v. Moore et al.]

preme court of the state, and is now fully before us. It is agreed on the part of J. Nicholson, that a judgment be entered against him for the sum of 110,000 dollars 89 cents, rating the stock for which the suit was brought at certain specified prices. It is stipulated that "in the set off the stock be allowed at the same rate, the defendant to be allowed three months to point out any errors to the satisfaction of the comptroller-general and register-general; such errors to be deducted from the sum for which the judgment shall be entered." Errors, if any, against the commonwealth, are also to be corrected. The agreement concludes, "the sum for which judgment is now entered to be altered by the subsequent calculation of the comptroller-general alone." What are we to understand by this? That the commonwealth claims of J. Nicholson on that suit the sum of 110,000 dollars 89 cents; that J. Nicholson, having then nothing to show to diminish that sum, agreed that a judgment should be entered against him; a final judgment for that amount: but supposing that he might show himself entitled to some reduction or set off, or might detect some error in the account, a right is reserved to him to do so, provided it was done within three months. If within that period he had shown an error or a further credit, he was entitled to do so. What effect would that have had on the judgment? It would neither have opened it, nor in any manner disturbed it, nor have entitled J. Nicholson to any further trial before a jury. It would have lessened the amount to be paid in satisfaction of the judgment, and for which an execution might be issued, and nothing more; nor even this, unless the comptroller and register were satisfied of the justice of the deduction demanded. But J. Nicholson lived for several years after the date of this agreement, and never pointed out an error or claimed any deduction or set off, as far as we are informed. Further, an execution issued on that judgment two years before J. Nicholson's death, and we know of no objection made to it by him; or any allegation or pretence that it was contrary to the agreement for entering the judgment.

It has been finally argued that these laws violate the contract made by the commonwealth when she sold them, that they should be subjected to the payment of the debts of the purchaser only in the usual mode by which other lands of any other citizen were subject. We ask, where is this contract or any evidence of it? Again, how has it been shown that the lands of any other citizen, being a debtor to the commonwealth, might not have been subjected to the

[Livingston and Nicholson v. Moore et al.]

same proceedings? The plaintiffs must sustain both these positions to give any force to the argument. In this case it is not only the lands of J. Nicholson, bought of the commonwealth, that are subjected to the provisions of these laws, but all his real estate, however he may have obtained it. The effect of this argument would be to render the law void as to the real estate purchased of the commonwealth, and good and constitutional as to all the rest. The case of *Stoddard v. Smith*, 5 Binn. 355, sufficiently answers this objection. Certain lots in the city of Washington were sold, and bonds and notes taken for the purchase money. These not being paid, the commissioners resold the lots, agreeably to an act of the legislature of Maryland, passed subsequently to the contract of sale; and it was contended that this impaired the validity of the contract and was therefore unconstitutional. The supreme court of this state said, No; it does not impair the contract, but merely gives a *new remedy*. This act of Maryland gave a special procedure in a *particular case* which has been so strongly urged as unconstitutional against the acts of Pennsylvania. If the process to sell the land in 1798, was not a violation of the agreement, how is the process for the same purpose a violation in 1807, provided it is clear of other objections?

We proceed to the other objections, on constitutional grounds.

1. It is a judicial act. The position that a legislature cannot constitutionally perform a judicial act, is supported by no authority: nor has it any reason in public policy or convenience. On the other hand it is contradicted by legislative usage and the highest judicial decisions. It is true, as has been argued by the plaintiffs, the constitution of Pennsylvania divides the powers of government under three general heads of legislative, executive and judicial: that it ordains that "the legislative power of the commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives," that "the supreme executive power shall be vested in a governor," and that "the judicial power shall be vested in a supreme court," &c.

This, however, is only a declaration of the general system or theory of our government, and was never intended to fix exact and impassable limits to each department. There are things necessary to be done in the administration of the government, of a character so mixed and blended, partaking of the elements of all these divisions of power, that we could not know to which to assign it; it could not be exclusively claimed by either. If, however, the acts performed

[Livingston and Nicholson v. Moore et al.]

in this case by the legislature were clearly judicial, they are not therefore unconstitutional and void. So have the supreme court adjudged in several cases, at least in relation to the constitution of the United States; so have the courts of Pennsylvania repeatedly said, sitting under the constitution of Pennsylvania, and deciding upon acts of the legislature partaking largely of judicial functions. That this division of power is not to be taken so strictly as the plaintiffs contend for, is manifest from the unquestioned laws that have been produced upon this trial, treated and claimed by both parties as good and valid acts of legislation; in which you have seen judicial powers, strictly such, given to the executive in the settlement of the accounts of persons with the commonwealth. This is a question of debtor and creditor, of charges and vouchers between the commonwealth and a citizen, and the governor is constituted the tribunal to decide it, with all the powers of a judge and jury, in all cases where the register and comptroller shall differ. The whole judicial authority in such cases is vested in the governor; he decides the law and the fact; he receives or rejects evidence; he exercises, indeed, higher and greater judicial powers, than are given to any court, between citizen and citizen.

I have given this consideration to the question, because it has been so seriously insisted upon by the counsel for the plaintiffs. But how does this objection stand in point of fact? What judicial power was exercised by the legislature in these acts? I can discover none. They do not decide the question of indebtedness of J. Nicholson to this commonwealth, nor its amount. This was *finally and conclusively* done, not only as regards J. Nicholson, but the commonwealth also, by a settlement of an account more than ten years before. It was also done as conclusively by a judgment confessed by J. Nicholson in the supreme court of the state, the supreme judicial power, ten years before. There was nothing left on this head to be decided by any authority. Does then the act decide the other question between the commonwealth and J. Nicholson, that is, the alleged lien on all his real estate? Not at all. It neither creates the lien nor gives it any strength or legality that it had not before. The lien had been created by a law of the commonwealth passed more than twenty years before, and acted upon in relation to all public debtors from that period. In 1807, the legislature, taking the debt as it had been legally and finally ascertained by a settlement of the account of J. Nicholson, or as it had been confessed and admitted in March

[Livingston and Nicholson v. Moore et al.]

1797 by J. Nicholson himself, and taking this lien as it had been given by the law of 1785, proceed to collect their debt, and enforce their right by the provisions of the laws now questioned. They are truly and strictly, as has been argued for the defendants, remedial acts to enforce a right, not to give it; to collect a debt, not to adjudge it to be due.

These observations will also serve as an answer, or at least as expressing my opinion of the objection that has been so pressed upon these laws as being made in violation of the constitutional right to a trial by jury. Trial by jury should be as heretofore. This is true, but it must be in a case in which there is something for a jury to try. On a careful examination of these acts, I have been unable to see a simple fact or enactment in which J. Nicholson or his heirs have the least interest or concern which could, by any of our forms of proceedings or principles in the administration of law, be submitted to a jury for any purpose or in any shape. Was it the province of a jury to decide upon the powers given to the commissioners, the process or proceedings directed in order to make the sales, the terms of sale, the manner of sale, the authority to make compromises; in short, if a trial by jury were this moment offered to the heirs of J. Nicholson, in relation to any of the provisions or matters contained in these laws, I know not what they could point out as a subject upon which a jury could act within the ordinary and established limits of their jurisdiction or authority.

There is no novelty in this proceeding as to the material matters of fixing the debt and selling the lands of the debtor without the intervention of a court or the use of the ordinary process of the law. The ordinary taxes apportioned upon every citizen by assessors and commissioners, may be collected by a summary sale of the goods and chattels of a delinquent, on a very short notice.

The taxes assessed on unseated lands, whose owners may reside at any distance, may be sold for such taxes without the aid of any court, or jury, or inquisition, under the authority of county commissioners, and by a course of proceedings very similar to that provided by the acts now in question, and very different from the ordinary modes of proceeding to recover debts.

These revenue laws have never been questioned as infringing the right to a trial by jury, or violating any part of the constitution.

Some other provisions of the constitution of the United States and of Pennsylvania have been referred to, especially those which declare

[Livingston and Nicholson v. Moore et al.]

that no man shall be deprived of his property unless by the judgment of his peers, or the law of the land. The construction put upon the clause in the constitution is repudiated by the opinion of the court in *Stoddard v. Smith*, already referred to. It does not mean that his property may not be made to answer for his debts in any other way than by the usual and established modes of proceeding to recover debts, and the general laws of the land on that subject. A direct act of legislation to take his property and give it to another, or to the commonwealth, might be liable to the exception. But when a man holds property which is subject to his debts, is a law unconstitutional which directs a proceeding by which this property is made to produce the money or debt to the payment of which he was liable? Is this depriving him of his property against or without the law of the land?

The objection made to these laws arising from the sections in relation to the Asylum Company, appears to me to have no unconstitutional enactments, even as regards that company, much less any of which the present plaintiffs can avail themselves.

I also pass over the lien claimed by the defendants in virtue of the general law of Pennsylvania, by which the debts of a decedent are charged upon his lands. If necessary hereafter the defendant will have the benefit of these laws.

Upon the whole, and the best consideration I have been able to give this long and interesting case, during a trial in which my attention has been so much absorbed by the arguments of the most able counsel, coming out in their utmost strength, with great labour and long preparation, I am of opinion :

1. That the accounts between John Nicholson and the commonwealth, or some of them, were so settled and adjusted that the balances or sums of money thereby found due to the commonwealth, were good and valid liens on all the real estate of John Nicholson throughout the state of Pennsylvania.

2. That the judgments rendered by the supreme court of the state in favour of the commonwealth against John Nicholson, also constituted good and valid liens upon all his real estate throughout the state.

3. That the several acts of the general assembly of Pennsylvania passed on the 31st of March 1806, and on the 19th of March 1807, are not repugnant to or in violation of the constitution of the United States, or of Pennsylvania, but that they are good and valid laws,

[Livingston and Nicholson v. Moore et al.]

and a rightful exercise of the powers of the legislature of Pennsylvania.

The whole law of the case is therefore in favour of the defendants.

Verdict and judgment for defendant.

On a writ of error to the supreme court the judgment in this case was affirmed. 7 Peters 469.

Circuit Court of the United States.**PENNSYLVANIA, APRIL TERM 1830.****BEFORE****HON. JOSEPH HOPKINSON, District Judge.**

**GRACE GARDENER, A CITIZEN OF LOUISIANA v. WILLIAM WAGNER
AND JACOB WAGNER, CITIZENS OF PENNSYLVANIA, EXECUTORS
OF GRACE WAGNER DECEASED.**

In construing a will we must first look to the particular clause in question, at the same time taking into our view the whole instrument, endeavouring to give meaning and effect to every part of it.

Testator devised to his daughter G. two houses and lots, "she permitting, at the same time, her mother to *occupy and dwell* in the better of them for and during her natural life." This is not a grant of the beneficial interest in the house to the mother, so that she may either occupy it herself or let it to another, receiving from it the rents it produces. It is a permission to her to live and reside in the house, and entitles her to no other use and enjoyment of it.

The executors of the mother were ordered to account for the rents, issues and profits received by her from the house, allowing her for expenditures for repairs, &c., and provided that the account should not extend back beyond six years from the filing of the bill.

THIS suit arose on the will of Jacob Wagner, in the following words:

"In the name of God, amen. I, Jacob Wagner the elder, of the city of Philadelphia, cooper, being very sick and weak in body, but of perfect mind and sound memory, thanks be to God, calling to

[Gardener v. Wagner.]

mind the mortality of my body, and knowing that it is appointed for all men once to die, do make and ordain this my last will and testament; that is to say, principally, and first of all, I give and recommend my soul into the hand of Almighty God that gave it, and my body I recommend to the earth, to be buried in decent christian burial, at the discretion of my executors, nothing doubting but at the general resurrection I shall receive the same again by the mighty power of God. And as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise and dispose of it in the following manner and form:

“Unto my eldest son, Jacob, I do give and bequeath my two lots on Cherry alley, with the arrearages of ground rent due on the same, as also that one of my lots on Wagner’s alley, which adjoins a certain lot now in the tenure of Henry Nagel.

“Unto my two eldest daughters, Elizabeth and Mary, that certain three story brick house in which I now live, and the lot or lots thereunto belonging, being twenty-eight feet in front on Moravian Alley, with all the appurtenances, to hold jointly.

“Unto my son George Washington, my houses and lot next adjoining the aforesaid, with all the appurtenance thereunto belonging, together with my cooper shop, tools and utensils of my trade.

“Unto my daughter Grace, my two houses and lots situate in German street in the district of Southwark, she permitting at the same time her mother, Grace, to occupy and dwell in the better of them for and during her natural life.’

“Unto my youngest son, Peter, that certain corner house situate on the corner of Sassafras street and Wagner’s alley, with the lot on which it stands; also two of my lots on Wagner’s alley, and one of the two vacant lots on Sassafras street.

“Unto my youngest daughter, Margaret, that certain house and lot adjoining the aforesaid house on Sassafras street, the remaining vacant lot on Sassafras street, and the two remaining vacant lots on Wagner’s alley.

“Excepting always, nevertheless, that my wife, Grace Wagner, receive one-third part of the profits and rents issuing out of all and every the aforesaid estates for and during the space of her natural life; and also that she receive the whole and all of the rents and profits issuing out of each child’s estate, until such child shall have arrived at the age of twenty-one years, for the maintenance of my children and in lieu of her dower.

[Gardener v. Wagner.]

“Also, it is my will, that should any of my children unluckily die before they shall have arrived at the age of twenty-one years, then their share shall be divided in an equal proportion amongst the surviving children.

“Further, it is my will that my house and lot on Third street, my loan office certificates, my stock and my outstanding debts, be applied to the purpose of paying and discharging my debts, and the residue, if any, to be paid to my wife.

“Lastly, I do hereby appoint my beloved brother, John Wagner, and my faithful relative, Peter Knight, my executors, and my beloved wife Grace, my executrix.

“In witness whereof, I have hereunto set my hand and seal, this thirtieth day of November in the year of our Lord one thousand seven hundred and ninety.”

Demurrer.

The case was argued on the following agreement.

“Gardener v. Wagner. Circuit Court of the United States, April session 1830.

“It is agreed that upon the pleadings in this case, the question to be submitted for the opinion of the court is, whether under the will of Jacob Wagner, who devised two houses in German street to his daughter Grace, ‘she permitting, at the same time, her mother, Grace, to occupy and dwell in the better of them, for and during her natural life,’ the executors of the mother, Grace, who did not herself live in the house designated in complainant’s bill, but rented it to others, are liable to account for the rents she may have received. If the court shall be of opinion that she had the right to receive the rents, then judgment to be entered, on the demurrer, for the defendants. If they shall be of opinion that the executors are bound to account, then the demurrer to be withdrawn, and the defendants to be at liberty to answer the bill.

“CHARLES WHEELER, for complainant.

“T. KITTERA, for defendant.

“April 26th, 1831.”

Mr Wheeler, for the complainant.

The mother had only a right of occupation. If she did not occupy the house, she had no right in it. 2 Bl. Comm. 157; Co. Litt., sect. 325, 328, 329; Cro. Eliz. 146; Creckmere v. Paterson, 2 Conn. Rep. 201; Wheeler v. Walker, 5 Serg. & Rawle 375.

[Gardener v. Wagner.]

Mr Kittera, for respondents.

This part of the will is a devise in fee to the daughter of the testator, but to that devise a condition is annexed, "she permitting her mother," &c., but to the estate given to the mother no condition is annexed; conditions must be clearly expressed. The estate of the daughter could be defeated by a breach of the condition; but no intention appears in the will to restrict the estate of her mother, the widow of the testator. One-third of the profits and rents of all the estate is given to the widow for her life, and she is also to receive the whole of the rents and profits of each child's estate, until such child shall arrive at the age of twenty-one years, for the maintenance of the children. The clause in question was intended for the benefit of the widow; there is no reason why the condition now contended for should be imposed upon her. The words of the will are, "to occupy *and* to dwell." "*And*" may be construed conjunctively or disjunctively, so as to carry into effect the intention of the testator.

To occupy, does not mean to live in the house, to reside in it, but to have possession of it, by yourself, or by another for you and under your will and right.

If it was a condition, there must be an entry to defeat the estate; if a limitation, it expires of course. Plowd. Comm. 542, tit. Occupancy defined; 8 Petersdf. 320.

The mother did make her choice between the two houses. If Grace permitted her mother to receive the rents and profits of the house, it was a permission to occupy; and in case of the death of Grace, it would go subject to this incumbrance. If Grace's license was necessary, the intention might be defeated, as she might survive her mother. 4 Kent's Comm. 114, tit. Doctrine of Conditions.

Mr Wheeler, in reply.

If the daughter refused, the mother could have enforced her right; she has the fee, subject to her mother's right of occupancy. Her only remedy is to claim possession. Did not the testator clearly intend that his widow might elect which of the two houses she would occupy herself? she would live and dwell in? Is it necessary to change *and* for *or*, to give effect to the intention? The occupancy of the house is given to herself, not to her and her assigns. The daughter is to permit the mother to occupy and dwell, &c. This may make her a trustee for her mother. If the daughter should

[Gardener v. Wagner.]

forfeit by refusal of this permission, the only effect would be that the mother could enjoy at once, and there would be a reversion to the heirs of the whole estate. *Hamilton v. Elliott*, 3 Serg. & Rawle 384; 2 Conn. Rep. 201; 2 Chitt. Rep. 529. No election was made by the widow.

The opinion of the Court was delivered by HOPKINSON, J.

The question in this case arises on the following devise in the will of Jacob Wagner. After giving certain lots to his son Jacob, and a house and lot to his two eldest daughters Elizabeth and Mary, the testator devises as follows: "unto my daughter Grace, my two houses and lots, situate in German street, in the district of Southwark, she permitting, at the same time, her mother Grace, to *occupy and dwell* in the better of them, for and during her natural life." The mother of the devisee is now dead; and the devisee sets forth in her bill of complaint, "that she (the devisee) came of age on the day of October 1800; since which time, until her decease, which took place on the 1st of March 1829, the said Grace Wagner (her mother), under colour of right, under the first clause of the said Jacob, the father's will, as above recited, claimed and received the rents, issues and profits of the easternmost house, and deforced the complainant of the said house, without ever residing in the said house or either of them at all." The bill prays for a decree, ordering the executors of the said Grace Wagner deceased, to "file an account, stating what rents, issues and profits the said Grace Wagner received from the said house, and disclose what estate she left," and that the estate which she left may be made liable for the payment of the claim of the complainant; and that the said executors may be compelled to pay her the net amount of the rents, issues and profits received from the said house.

We must observe, that other houses and lots than those above mentioned are given and devised to other children of the testator; and after all, there is the following clause in the will, "excepting always, nevertheless, that my wife Grace Wagner receive one-third part of the rents and profits issuing out of *all and every* the aforesaid estates, for and during the space of her natural life; and also that she receive the whole and all of the rents and profits issuing out of each child's estate, until such child shall have arrived at the age of twenty-one years, and in lieu of her dower."

To this bill the defendant has demurred, which, together with an

[Gardener v. Wagner.]

agreement of the parties, submits the question to the court, whether, on the facts stated, and the true construction of the will of Jacob Wagner, the complainant is entitled to the relief she prays for.

The rules adopted, in equity and at law, for the interpretation of wills, are well settled, and entirely consistent with justice and common sense. We must look for the intention of the testator in the particular clause in question ; at the same time taking into our view the whole instrument, with a reasonable endeavour to give meaning and effect to every part of it. In this case the inquiry is, whether the permission, enjoined upon Grace, the daughter, and attached to her legacy of two houses, to be given to her mother to occupy and dwell in the better of them, is a grant of the beneficial interest in the house to the mother during her life, so that she might, at her pleasure, either occupy and dwell in it herself, or give the occupancy to another, and receive in lieu of it, the rents and profits it would produce ; or whether it is to be taken strictly as a permission to her to reside in the house, and to be entitled to no other use or enjoyment of it.

We first look at the terms of the grant—the expressions which the testator has chosen to manifest his intention. The houses are devised, in fee, to his daughter ; but it is a condition, or rather an appendage to the gift, that she shall permit her mother to occupy *and* dwell in the better of them. There seems to be no ambiguity here. If the testator had used only the word *occupy*, which signifies to possess, the uncertainty would have been greater ; but he adds, as if explanatory of his meaning, *and dwell*. To dwell, is to inhabit ; to live in a place ; to reside ; to have a habitation. It is then as if the testator had said, “she permitting her mother to live in the house—to have a habitation there.” Could there have been any doubt if these terms had been used ? The defendant is entirely conscious that this is the proper meaning of the clause as it stands in the will, and endeavours to avoid it by changing the phraseology, and turning *and* into *or* ; or rather by expunging the one and introducing the other into its place. But what right have we to do this ? It is true it may be done when it is necessary to carry into effect the clear and manifest intention of the testator. How does this necessity appear here ? There is nothing incongruous or unreasonable in the plain and ordinary interpretation of the words as they now stand. To say that the intention was different, would be to go directly in opposition to the language he has adopted to express his intention—indeed it would be to assume the very matter that is in controversy.

[Gardener v. Wagner.]

In looking to other parts of this will, we not only find them in full accordance with this construction of the clause in question, but truly not reconcilable with any other. After making all the devises we have mentioned of houses and lots to his children, the testator limits the fullness of these gifts by excepting that his "wife, Grace Wagner, receive one third part of the rents and profits issuing out of *all and every the aforesaid estates* for and during the space of her natural life." This provision includes the two houses given to his daughter Grace, now in question. What do we collect to be the clear and consistent meaning of the testator from both clauses in his will? What was his design? Assuredly this ; my wife shall have a third part of the rents and profits of all and every part of my real estate ; but, as to one of the houses, if she shall choose to live or dwell in it, she shall be permitted so to do, and, in this manner, have the whole use or enjoyment of it ; but if she shall decline this permission or privilege, then the offer of it becomes inefficacious, and she must resort to the other part of the will which gives her one-third of the rents of all and every of the houses and lots before devised to the children. She may take or reject the permission or privilege as it is offered, but she cannot alter or enlarge it.

The construction contended for by the respondents would make the testator say, as to the house in question, that he gives his wife all the rents and profits issuing from it, or one-third of them, at her option, which is incongruous and absurd. To say to her, you may live in a certain house, or take one-third of the rents and profits it may produce, is intelligible ; but to say, you may take all the rents, or one-third of them, at your election, is senseless, or so nearly so that it should not be imputed to a sane testator, if we can escape from it.

On the 26th of December 1831, this cause came on for hearing on bill of demurrer and plea, and the court, after hearing the arguments of counsel, do award and decree, that the defendants account for the rents, issues and profits received by the said Grace Wagner from the house mentioned in the complainant's bill, subject to the payments and expenditures made by her for repairs or otherwise in relation to the same. And they further direct, that it be referred to the master to report an account to this court, provided, however, that said account shall not extend back beyond six years from the filing of the bill.

[Gardener v. Wagner.]

N. B. Before the above order and decree was made, the following agreement, signed by the counsel of the parties respectively, was filed of record : " It is agreed, that if the court shall be of opinion that the testatrix had not a right to receive the rents of the house, in the complainant's bill mentioned, to her own use, but was bound to account to her daughter, they shall also decide for what period of time her executors are bound to account ; and under their opinion the case shall be referred to the master of the court to take and state an account between the parties touching and concerning the rents, issues and profits received by the said Grace Wagner from the house mentioned in the complainant's bill, and the payments and expenditures made by her for repairs or otherwise in relation to the same ; and that the said master report the balance which, on said account, shall be found due from either party to the other ; and that the said master have power to examine the parties and witnesses on oath, and to compel the production of books, documents and papers ; and that further proceedings be reserved until the coming in of the said report.

Circuit Court of the United States.**PENNSYLVANIA, APRIL TERM 1827.****BEFORE****HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.****LESSEE OF SHEEPHANKS V. BOYER.**

An affidavit of merits is not necessary on a motion to set aside a judgment by default irregularly entered. When the counsel of a defendant in ejectment requested the clerk to enter his appearance, who promised to do it, a subsequent judgment by default on a rule to plead in twenty days is irregular.

THE declaration was served on the 11th of April ; a rule to plead in twenty days or judgment was entered, and on the 4th of May, on proof of personal service of the declaration, judgment was entered, and habere facias possessionem issued. On the 16th of October 1827, Mr Rawle, Jun., moved to set aside, on his affidavit, that before any entry of judgment, he called on the clerk, and directed him to enter an appearance for the defendant, which he promised to do.

The motion was opposed by Mr Chauncey, on the ground that the judgment was regular, and the defendant had not made an affidavit of merits.

BY THE COURT.—An affidavit of merits is necessary where the

[Lessee of Sheepshanks v. Boyer. Bullock v. Van Pelt.]

defendant is in default and the judgment is entered pursuant to the rules of the court. Here there was no default ; the application to the clerk, and his promise to enter an appearance, are equivalent to an appearance ; the attorney was not bound to enter his appearance on the docket, and though the plaintiff's counsel did not know of the application, yet as he takes judgment at his own risk, he cannot retain it under such circumstances. The judgment and execution must be set aside.

BULLOCK V. VAN PELT.

After a cause has been at issue eighteen months leave will not be given to a defendant to plead non est factum without affidavit denying the execution of the bond.

AFTER this action had been pending for three years, and at issue eighteen months, Mr Desmond moved to add the plea of non est factum, which the court refused to allow, it being suggested by the plaintiff's counsel that it would subject him to great inconvenience, and the defendant not making affidavit denying the execution of the bond, or otherwise accounting for the delay in putting in the plea.

Circuit Court of the United States.**PENNSYLVANIA, APRIL TERM 1832.****BEFORE**

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

TILGHMAN AND WIFE V. TILGHMAN'S EXECUTORS.

Equity will not enforce a contract which is not definite and precise in its terms, or reform a written contract by a previous one by parol on the same subject; any variance will be presumed to have arisen from a change of intention, in the absence of fraud, mistake or accident.

The writing must recite or refer to something by which to reform it, or there must be some matter of higher authority than the writing to authorize it.

If a paper deliberately agreed upon to effect an object, fails to do so by the death of the party who was to do the necessary act, equity will not give a remedy by setting up a previous agreement.

A party must rely on the case stated in his bill or answer; if he sets out a contract in writing, he cannot recover on a verbal one not set up in the bill or answer.

Equity will not construe a marriage contract differently from its terms, in favour of the parties to the marriage, though they would do it in a similar case in favour of the issue.

By an agreement in consideration of an intended marriage, the portion of the wife was to be raised out of her real estate of which her father was tenant by the curtesy, by a sale after she arrived at twenty-one; the marriage took effect; the wife attained twenty-one, and died two months afterwards, without any act done by her towards the completion of the settlement, or any request by the husband to the father to have it done. *Held:*

That as the act must be a concurrent one, the party who claims a remedy for non

[Tilghman and Wife v. Tilghman's Executors.]

performance must aver and prove performance, or an offer and readiness to perform, on his part.

That where no time is fixed in the contract, the party desirous of performance must hasten it by a request. That none being made after the wife came of age, the father or his estate was not liable for the non performance.

A general allegation in a bill against an executor, that he retains the money of the estate in virtue of a pretended debt, claimed from the testator by a pretended contract which the bill denies, and the prayer of the bill is generally for an answer to the matters charged therein, does not make the answer of the executor evidence to support such debt, when he admits there is money of the estate in his hands, for which he must account if he does not establish the debt.

An answer denying the right of a complainant is evidence in favour of a defendant. But if he admits the right, and sets up new matter in bar; if he admits the charge, and avers a discharge at a different time by a distinct transaction, or sets up an affirmative claim in his own right to the subject matter claimed by the complainant, it is not evidence in his favour; the defendant must make out his case as a plaintiff ought to do.

THIS case arose on a bill filed by the complainants, who were legatees under the will of the late Chief Justice Tilghman, against E. S. Burd and Benjamin Chew, Jr., esquires, his executors, praying for an account of his estate and payment of their legacies out of the surplus.

Separate answers were filed by the executors, Mr Burd admitting a balance on hand for distribution among the legatees, Mr Chew claiming a right to retain it for a debt due him by the testator. The existence of this debt was the only matter in controversy. By the will the testator devised the residue of his estate to his grandson, the son of the defendant, Chew, and the testator's only daughter and child, in full property; in case of the death of the grandson before twenty-one and without issue, among other bequests was the following, "My son-in-law, Benjamin Chew, Jun., if living at the time of the death of my grandson as aforesaid, shall have for his own use 5000 dollars lawful money aforesaid, in addition to the sum of 10,000 dollars to which he is at all events entitled at my death in right of his late wife, by virtue of a bond which I gave her in my lifetime." Legacies were also given to the complainants.

The will was dated the 16th of October 1819, the grandson died the 6th of April 1820, under age and without issue, the testator died the 29th of April 1827, without having altered his will, of which the defendants took the administration. The legacy of 5000 dollars and the post obit bond of 10,000 dollars were received by Mr Chew before filing the bill.

[Tilghman and Wife v. Tilghman's Executors.]

After reciting the will, &c., the bill proceeds in the usual form and concludes with the following charge and prayer.

“But now, so it is, may it please your honours, that the said Benjamin Chew, Jun. and Edward S. Burd, combining and confederating with others, to your orators unknown, whose names, when discovered, they pray leave to insert, with apt words to charge them as parties, pretend that the said personal estate of the testator, and the proceeds of the sale of the real estate are not more than sufficient to pay and satisfy his funeral expenses, debts and legacies, by reason of an alleged debt to a very large amount, claimed to be due from the testator to the said Benjamin Chew, Jun., one of the said executors, upon a certain pretended contract or agreement entered into between the testator in his lifetime and the said Benjamin Chew, Jun. Whereas your orators charge that the testator never did enter into any such contract or agreement as is pretended, and that no debt is in law or equity due to the said Benjamin Chew, Jun., by virtue of the said pretended contract or agreement, or in any other manner whatever; or, that if the testator did ever enter into any such contract or agreement as is pretended, it was satisfied in his lifetime or by bequests and devises to the said Benjamin Chew, Jun. in his will, which the said Benjamin Chew, Jun. has accepted. And the said executors do refuse to come to a just and fair account with your orators for the personal estate of the testator, and the proceeds of the sales of the real estates aforesaid, in order that the clear residue of the testator's estate may be ascertained, and to pay over to your orators such proportion of the same as they are entitled to receive under the directions of the said will. All which actings and doings of the said executors are contrary to equity and good conscience, and greatly to your orators' prejudice.

“In consideration whereof, and forasmuch as your orators cannot have plain, adequate and competent remedy at law, to the end therefore that the said executors and their confederates, when discovered, on their oaths or affirmations, full, direct and true answers may make to all and singular the matters and things hereinbefore set forth as if they had been particularly interrogated thereon; and that they may render and set forth a just and true account of all and singular the personal estate of the said testator, and of the moneys arising from the sale of the said real estate, and pay over to your orators such proportion of the clear residue of the testator's estate as they are entitled to receive under the directions of the said will;

[Tilghman and Wife v. Tilghman's Executors.]

and that your orators may have such further relief in the premises as is consistent with equity and good conscience, and as to this honourable court shall seem meet."

As it was admitted that the executors had faithfully administered, and accounted for all the estate which came to their hands, it is not deemed necessary to refer to the answer of Mr Burd, or to any other part of that of Mr Chew, except what relates to the debt claimed to be due to him by the testator, which is as follows:

"And this defendant further shows for answer to the complainants' said bill the following facts and circumstances, which, as he is advised and believes, clearly manifest the existence of a heavy debt due to him from the said testator, and justify and require the appropriation of any funds which may be in the hands of the defendants as executors in discharge thereof.

"Previously to the intermarriage of this defendant, the terms and conditions upon which the marriage should take place were treated of, and an arrangement was made between the said testator, this defendant, and his father, Benjamin Chew, Esq., whereby it was mutually promised and agreed that the latter should give to this defendant, on the said marriage, land in fee simple valued at 5000 dollars, and allow him the interest of 25,000 dollars annually. And the said William Tilghman would give for the advancement of his daughter in the said marriage 30,000 dollars. And he further declared and promised to this defendant, and to his said father, that he, the said William Tilghman, would do on the occasion of the said marriage whatever the said Benjamin Chew the elder would do, and more.

"On the day previous to the said marriage the testator aforesaid exhibited and presented to this defendant a paper in the proper handwriting, and with the proper signature of the said William Tilghman, and received the assent in writing of this defendant to the same. The fourth schedule, hereto annexed as part of this answer, is a true copy of the said paper and assent, and the original is ready to be produced to this honourable court.(a) On the 11th

(a)

Philadelphia, July 10, 1816.

MY DEAR SIR,—As my daughter, to whom you are to be married, is under age, I think proper to mention what I propose to be done after she arrives at twenty-one; and from the conversation we have recently had, I make no doubt but it will be agreeable to you. In order to procure an income we must resort to the Northampton estate, which, although valuable, is unproductive in its present state. I intend that

[Tilghman and Wife v. Tilghman's Executors.]

day of July 1816 the said marriage accordingly took place. The said testator afterwards declared to the defendant's said father what had been concluded and articulated between himself and this defendant by the contract of the 10th day of July 1816; and although the stipulations thereof varied materially from the original intent, meaning and views of the said father of this defendant, and from what had been previously agreed upon between them, yet, moved by his affection toward his son and daughter-in-law, and disregarding the inequality of these subsequent conditions, for the first time then sub-

so much of it shall be sold as will produce 30,000 dollars, of which 5000 may be expended in furniture, and the remaining 25,000 placed in your hands, to be used by you as you think proper. This capital of 25,000 dollars is to be considered, after your death, as a debt due from your estate. If your wife survives you she is to receive it from your estate, and if she dies before you she is to have the right of disposing of it as she pleases, either by last will and testament, or any writing in nature thereof, or any other writing executed in the presence of at least two witnesses, during her coverture; but if she should die without making any such disposition, then, after your death, the said 25,000 dollars is to be distributed according to the law of Pennsylvania, in the same manner as it would be if your wife had died possessed of it and unmarried. Provided, that if it should be made to appear by any books, writings or papers of yours, in what property, real or personal, the said 25,000 dollars stand invested at the time of your death, then, instead of that sum being considered as a debt against your estate, the specific property shall go to your wife, if she survives you absolutely; or in case she dies before you, be subject to her disposition as aforesaid; and if she makes no disposition thereof, it shall descend or be distributed, according to its nature, in the same manner as if she had died seised and possessed of it unmarried.

I am, dear sir,

Very sincerely and affectionately, yours,

WILLIAM TILGHMAN.

To Benjamin Chew, Jun., Esq.

July 10, 1816.—The above proposals are perfectly agreeable to me, and I engage to do any thing necessary on my part for carrying them into effect.

B. CHEW, JUN.

William Tilghman, Esq.

(Indorsed) 10 July 1816.—W. Tilghman's proposals respecting his daughter's property to B. Chew, Jun., and Mr Chew's assent as to the same.

Mem. May 10, 1818. The settlement intended to have been made of part of my daughter's estate was prevented by her unfortunate death, soon after she came to the age of twenty-one. The land which was to have been sold with her concurrence, cannot now be sold, as the reversion, after my death, is vested in her infant son. Mr Chew, however, will receive 10,000 dollars on my death, being the amount of a bond which I gave to my daughter, in consideration of her releasing to me her interest in certain parts of her real estate.

WILLIAM TILGHMAN.

[Tilghman and Wife v. Tilghman's Executors.]

mitted to him, after the said marriage had taken place, but for and in consideration of the stipulations on the part of the said William Tilghman thus reduced to writing, he, the said father of this defendant, assented to the agreement made on the 10th day of July aforesaid, and undertook to add largely to the advantages he had previously agreed on for the said marriage, stipulating that in case of the defendant's death he would give to his family the same provision designed for the defendant himself in the event of his surviving his said father. The fifth schedule, hereto annexed as part of this answer, is a copy of the memorandum made by the said William Tilghman, dated the 16th day of August 1816, relative to this transaction, and supports the allegation of the defendant, while it exhibits the confirmation of the said testator of the contract which he had previously made. (a)

“The defendant further states, that during the summer and autumn of 1816, and in the winter and spring of 1817, the said William Tilghman paid, at various times, to this defendant, and to others for him and for his use, according to and in part performance of the said contract of the 10th day of July 1816, the sum of 2500 dollars. These payments are manifested by the copy of entries in the said William Tilghman's books, which form the sixth schedule hereto annexed. (b) In the autumn succeeding the marriage, the said William Tilghman requested this defendant and his wife, on their return from his father's residence, then preparing to set up his own establishment, to reside with him temporarily, as he stated he had not then raised the money agreed on. He also stated to this de-

(a) Mem., August 16, 1816. I this day showed to B. Chew, Esq., the writing signed by his son Benjamin and myself, July 10th, 1816, respecting the disposition of my daughter's fortune, and he approved of it. I then mentioned to Mr Chew, that my intimacy with him and confidence in his integrity, had rendered it unnecessary to enter into any thing like a contract with him concerning the estate to be given by him to his son; but that I took for granted, that in case of his son's death, leaving issue by my daughter, he would make the same provision for his son's family by his will, which he would have made for his son himself, in case he had survived his father. Mr Chew declared this to be his settled intention; that justice required that the issue should stand in the place of the parent, and his own father had acted on that principle in making his will, and he himself should certainly do the same.

WM. TILGHMAN.

(Indorsed) 16th August 1816.—Mem. of a conversation between W. Tilghman and B. Chew, Esquires, respecting provision for his son's family in case he should die in his father's lifetime leaving issue.

(b) This schedule is omitted as it contains only the items so noticed.

[Tilghman and Wife v. Tilghman's Executors.]

fendant, that until he could raise the money he had agreed to pay him, he would pay this defendant the interest thereon. And this defendant replied, that he would not expect the said interest to be paid during the time he should reside with him, which this defendant continued to do, from the middle of the month of October 1816, until the death of his wife (which took place on the 16th day of June 1817), and for an inconsiderable time afterward, to wit, until the 1st day of July 1817, or within a few days more or less.

“ This defendant further states, that at the instance of the said William Tilghman, an act of assembly of the commonwealth of Pennsylvania was passed on the 11th day of April 1792 (4 Dall. Laws 462), whereby the said William Tilghman was empowered to sell and convey the estate and property of his said daughter, during her minority, in and adjacent to the town of Northampton (commonly called Allentown), and the land so authorized to be sold by the said William Tilghman is the same land referred to in the said paper, dated the 10th day of July 1816. But the said William Tilghman, notwithstanding the said authority, and his said contract which he was thereby authorized and empowered to conclude and to execute, did not sell and convey the said land during the minority of his said daughter, for the purpose of executing and fulfilling his said contract ; nor did he pay over to this defendant the amount or any part of it received by him from sales previously made by him of several parts or portions of the said land, unless the above mentioned 2500 dollars be considered as a part of the proceeds of such sales ; nor did he in any way (except as to the said sum of 2500 dollars) pay this defendant any part of the said sum of 30,000 dollars. And although the said William Tilghman then was, and until the time of his death continued to be tenant by the curtesy and in possession of the said estate, he did not sell or convey, or attempt to sell or convey the same, or any part of it, after his daughter became of age, nor did he propose to her or to this defendant to proceed to sell the same, or any part thereof, during her life, nor to this defendant after her death, in order or with intention to execute and perform his said contract of the 10th day of July 1816. Nor did he in any way pay to this defendant, or to any one for him, any part whatever of the interest accrued to him on the money due upon the said contract, except that in consequence of several conversations had during the summer of 1818, in which this defendant remonstrated urgently with the said William Tilghman, upon his omission to fulfil the said contract, and to pay the interest upon the sum due there-

[Tilghman and Wife v. Tilghman's Executors.]

on, and showed the inconvenience this defendant was, by the omission, subjected to, as well as the reciprocal nature of the contracts made at the time of the said marriage, the said William Tilghman authorized the defendant to receive as his tenant at will, under a stipulated rent, and under other conditions, the profits of a small farm, part of the land mentioned in the said contract, and part of the land which he was empowered to sell during the minority of his daughter by the said act of assembly of the 11th day of April 1799, as this defendant conceives, which said profits did not net to the defendant 100 dollars per annum, as he verily believes. And this defendant took the said profits towards satisfaction of the interest due to him in part, as far as the said profits would go, not being able to obtain other without legal proceedings, which the nature of his connexion with his father-in-law, the said William Tilghman, would not for decency permit, and the said defendant always intended and avowed his intention to discount the amount of the net profits received by him from the said farm, from the interest due to him, whenever he should come to a full settlement and obtain payment thereof. The seventh schedule hereto annexed, is a true copy of the said authority, in the proper hand writing of the said William Tilghman.(a)

(a)

Philadelphia, 22d August 1818.

MY DEAR SIR,—It was my wish, as I have often told you, to take upon myself the entire expense of maintaining and educating my grandson; but you are of opinion that this would be attended with inconveniences. I have, therefore, determined to give you possession of the farm in Lehigh county, now in the occupation of my tenant, Peter Walpman, together with my share of the crop this year, the best that ever was made there. You are to pay me a rent of one dollar yearly on the 1st day of January, *if demanded*, pay the taxes, keep the buildings and fences in good order, and suffer no waste to be committed in the woodland. You may have the farm during my life, subject to the following conditions: 1st, As every thing in this world is uncertain, it may happen that hereafter I may find it expedient to reside, at least during the summer seasons, in Lehigh county; in such case, I am to have the right of resuming the possession of any part or the whole of the farm; but if the child shall be living, and you shall still desire that he should receive his support immediately from yourself, rather than me, I will pay you, by way of equivalent, as much as in the opinion of judicious men would be a fair rent for the farm. 2d. If (which God forbid) the child shall die, I shall stand in a very delicate situation with respect to the estate in Lehigh county, and therefore must reserve the right of doing with this farm what, upon reflection, it shall appear to me that justice and prudence may require; but in all events, I shall be disposed to conduct myself towards you with kindness and liberality.

I am, affectionately, yours,

WILLIAM TILGHMAN.

BENJAMIN CHEW, Esq.

[Tilghman and Wife v. Tilghman's Executors.]

“ During the minority of the said Elizabeth Margaret, and before her said marriage, the said William Tilghman sold divers estates, of which she was (solely or jointly with others) seised in fee simple of her own right, to wit: A farm in Bucks county, Pennsylvania, to John Flack, on the 13th day of February 1804, for 1500 pounds. A lot in Chestnut street, Philadelphia, to George Fox, Esq. on the 31st day of March 1802, for 1000 pounds. And a farm in Morris county, New Jersey, to Amos Grandine, on the 20th day of February 1799, for 3000 dollars. Also, after the said Elizabeth Margaret attained full age, the said William Tilghman requested this respondent (then married) to execute a deed of conveyance with his wife to Margaret Tilghman Lawrence (now M'Whorter), of all the estate, right and title of himself and his wife in and to a tract of land in Middlesex county, New Jersey, called the Longbridge farm, in pursuance of an engagement made to that effect by the said William Tilghman to colonel John Lawrence, father of the said Margaret T. Lawrence; a copy of which engagement, and of a letter from the said William Tilghman to the said Margaret T. Lawrence, in the proper handwriting of the said William Tilghman, form the eighth schedule hereto annexed.(a) The respondent accordingly proposed to his said wife to comply with the request of the said William Tilghman in this respect, and they accordingly did execute on the 14th day of May 1817 a deed of conveyance to the said Margaret Tilghman Lawrence (now M'Whorter), for all the estate of this respondent, and of his said wife (being one equal sixth part), in the said tract of land. And the said William Tilghman also requested the respondent (after his marriage as aforesaid) to execute a release to him of his own and of his wife's claims and titles to the said estates sold by the said William Tilghman, and to their purparts or proportions thereof, for which the said William Tilghman stood engaged by cer-

(a) Schedule eight consists of three documents, by which it appears, that Mrs Chew's grandmother died in 1799, upon which Longbridge farm descended to her issue, and testator's daughter, in right of her deceased mother, took one-sixth. But her grandfather stating that the grandmother had always intended this farm for her daughter Margaret (Mrs M'Whorter), testator entered into a written stipulation that his daughter, on attaining her majority, should comply with her grandmother's intentions as to this one-sixth of the farm. Accordingly when Mrs Chew attained her majority, she and her husband, by deed of the 14th of May 1817, united in a conveyance of her one-sixth for the consideration, therein expressed, of natural love and affection, and of one dollar, which is the conveyance referred to in this part of the answer.

[Tilghman and Wife v. Tilghman's Executors.]

tain obligations, copies whereof form the ninth schedule hereto annexed.(a)

“And the said William Tilghman declared to the respondent that he would therefor give a bond for 10,000 dollars, payable after his death, which he estimated to be an equivalent or more for the said estates and properties. And the respondent and his wife thereupon executed a deed dated the 14th day of May 1817, a copy of which forms the tenth schedule hereto annexed.

“But the respondent doth not, and never did consider the said bond an equivalent for the property released, but it became his property at the time of the execution thereof, and was so declared to be by the said William Tilghman to the respondent. The said bond remained in the respondent's possession, from the time of its execution until the said William Tilghman's death, and until the payment thereof by an appropriation of funds belonging to the estate. The eleventh schedule, hereto annexed, contains a copy of said bond, which was executed and delivered on the same day and at the same time with the deed of release aforesaid (although it bears on its face the date of the subsequent day). The respondent expressly alleges and maintains that a debt is now due to him from the estate of the said William Tilghman, by reason of the stipulations contained in the instrument hereinbefore referred to, dated the 10th day of July 1816, and that he never received payment of the same, except to the extent of 2500 dollars as aforesaid. And the respondent denies that the said debt has ever been satisfied, either in the lifetime of the said William Tilghman, or by bequests and devises in his will. And the

(a) Ninth, tenth and eleventh schedules consist of sundry documents, by which it appears that of certain real estate sold by the testator before his daughter's marriage for 9666 dollars and 67 cents, he was tenant by the curtesy, with remainder to his daughter as heir to her mother; that testator (with the consent of his daughter's nearest collateral relatives and heirs) conveyed the same in fee simple to the purchasers, with covenants that his daughter on her majority, or the heirs of his wife, if she died in her minority, should confirm the title. Mr and Mrs Chew accordingly, on the 14th of May 1817, released the same to the testator, who executed deeds of confirmation as required. The release of the 14th of May 1817 recites the facts fully, and is expressed to be in consideration of one dollar, and of 10,000 dollars secured by the testator to be paid to his daughter or her representatives within one year from his death. The bond securing this sum is accordingly an obligation to the daughter, payable within one year after testator's death, and is the same which is mentioned in the will. The eleventh schedule is a copy of this bond and of a receipt and acknowledgement by Mr Chew, the defendant, when he received payment of it out of the estate. The acknowledgement refers to the consideration of the bond, and declares that the money is received in full satisfaction thereof.

[*Tilghman and Wife v. Tilghman's Executors.*]

respondent expressly and especially denies that he ever received the said sum of 10,000 dollars in satisfaction, partly or wholly, of any debt due to him, except the debt due upon the said bond, or that he received the legacy of 5000 dollars, mentioned in the complainant's bill, in satisfaction or discharge of any debt or engagement, contract or liability whatever, or of any part or portion thereof, or that he received the profits of the farm, above mentioned, in satisfaction of the interest on the sums due to him, except so far as the amount of the said profits would go towards the discharge of the same; but maintains that his right to recover the balance due upon the instrument of July 10th, 1816, and the interest that has accrued thereon, is unimpaired and in full force, to wit, the sum of 27,500 dollars, with interest thereon from the 1st day of August 1817, deducting from the amount of the said interest the net profits received from the said farm from the 22d day of August 1818 to the 29th day of April 1827, when, by the death of the said William Tilghman, he was deprived of the said profits. And the respondent further states that he did not, at any time, or in any manner, relinquish or waive his right to receive from the said William Tilghman, and from his estate, the sum stipulated in the instrument dated the 10th day of July 1816, with interest thereon. On the contrary, he declared repeatedly to the said William Tilghman, and at sundry times, that he considered the same due to him, and the said William Tilghman liable for the same. The said William Tilghman gave no direct or sufficient answer to such remarks, but on one of the occasions referred to observed, that if he was to pay this defendant, he would have to sell the house over his head, which expression was among the most powerful reasons why this respondent deferred insisting on his legal rights during the lifetime of his said father-in-law. On two different occasions the defendant declared to the said William Tilghman as aforesaid (that he considered the said sum due, and the said William Tilghman liable for it), previously to the 10th day of May 1818. He did not prosecute or pursue his claims except by personal remonstrances during the lifetime of the said William Tilghman, because of a sincere attachment to him, and of a decent respect for his ease and comfort, and because of the respondent's firm conviction that his lawful rights, acquired and purchased by an ample, valuable consideration furnished by his father, as well as by the good consideration of his marriage, would be in no manner impaired by his postponing to take legal measures for their recovery. The respondent states that at the foot of the instrument dated the 10th day of July 1816, there appears a memorandum, dated the 10th day of

[Tilghman and Wife v. Tilghman's Executors.]

May 1818, a copy of which is part (numbered B) of the fourth schedule hereunto annexed. The respondent explicitly denies that he, at any time, directly or indirectly assented to the same memorandum, or to the principles therein expressed. He positively asserts that he had no knowledge whatever thereof, or of any intention of the said William Tilghman to make such a memorandum, until long after it was made; and he distinctly and positively alleges and asserts, upon his oath, that it is in spirit and in letter, in form and in matter, wholly and directly contradictory and at variance with his views; expectation, belief and conviction, and with his unvaried, avowed, well known and positive declarations and determination. The said instrument, dated the 10th day of July 1816, having been prepared by the said William Tilghman, and presented by him to this defendant for assent, and having the signature of this respondent to it, and it being a matter of indifference in the hands of which of the two parties it should remain, when they had such faith in one another as to make and sign but one copy of an obligation, without witnesses, whereby they were bound to each other in the amount of so many thousands; and this respondent having a perfect confidence in the honour and good faith of his father-in-law, which are manifested by the preservation of the instrument, it naturally remained in the said William Tilghman's possession. But the respondent always regarded it as remaining there as in a place of safe keeping merely, without any right in either party to add, alter, amend or impair its full force and effect, and without any right of either party to inscribe or to indorse thereon any thing expressing sentiments of either party derogatory to their mutual understanding at the time the contract between them was made. And the respondent expressly protests against the said memorandum, and maintains that the original instrument itself remains in full force and virtue altogether unaffected by the memorandum made by one of the parties. The respondent further states, that besides the sales of the said William Tilghman, already enumerated, he and his wife did, on the 3d day of April 1798, convey to a certain Samuel Davis, for a nominal consideration, a tract of land being the estate of his said wife, the mother of the wife of the respondent, in the county of Northampton, containing five hundred acres adjacent to the borough of Northampton, which was reconveyed by the said Samuel Davis, on the same day, for a like nominal consideration to William Tilghman alone, who afterwards sold the same in various parcels to various persons for large sums of money, which were invested by him, as the respondent has frequently heard and

[*Tilghman and Wife v. Tilghman's Executors.*]

does verily believe, in the purchase of the house and lot in Chestnut street, where he resided for many years, and which he afterwards sold for 42,500 dollars. And the said William Tilghman, during the minority of his said daughter, sold, under the power vested in him by the act of assembly dated the 11th day of April 1799, sundry lots of ground belonging to his daughter, reserving a ground rent of 1 or 2 dollars on each lot sold, payable to himself for life, and after his death to his said daughter and her heirs. And he also received from the purchasers, for his own use, large sums of money or value, in addition to the said ground rents, amounting at the least to 6800 dollars. And the said William Tilghman did request and desire this respondent, after the decease of his said wife, to unite with him in a petition to the legislature of Pennsylvania for authority to sell, during the minority of the respondent's said son, lots in the borough of Northampton belonging to the said son of the respondent; the respondent did accordingly join in such petition. An act of assembly was passed on the 23d of March 1818 (Laws of 1817—1818), giving the said authority, and sales were made in virtue thereof, by the said William Tilghman, who received the purchase money or value amounting to more than 700 dollars. The said William Tilghman thus received from the various sources aforesaid, property and estates belonging to the wife and son of this respondent, or which would otherwise have belonged to them, a sum of money exceeding 50,000 dollars, which in equity and good conscience ought to have been applied to the discharge of the marriage contract aforesaid. The respondent, therefore, denying any injury or wrong to the complainants, denies also that there is any hardship to them in his taking and appropriating from the estate of the said William Tilghman the money which is due to him upon the said marriage contract and the interest thereon accrued, inasmuch as the said William Tilghman added to his own estate a sum much larger than is sufficient to pay the amount stipulated for by the said contract, together with the interest thereon, by means which were derived from the estates which would otherwise have come into the possession of the wife and son of this respondent and of himself." The conclusion of the answer is in the usual form.

The following paper was read in evidence at the hearing, together with the indorsement thereon, which was in the handwriting of the testator.

"The disposition which I wish to make of the estate of Elizabeth M. Tilghman, as it shall become subject to my disposal, is as follows:

[Tilghman and Wife v. Tilghman's Executors.]

“The law shall take its course with all land which may belong to her, except in case of no issue *surviving her*, when I renounce the tenancy by the curtesy.

“If I should survive her, I renounce my legal right to *her personal property*, except issue shall survive her also.

“All property will be included in the above two sections, which is *considered as capital belonging to her estate*.

“These two provisions to take effect in case of the subsequent death of issue, which may have survived her.

“To give *full* power of making a writing testamentary, which may dispose of every part of her estate, except issue survive her, when the disposition shall not be to their disadvantage.

“It being always understood, that during the coverture my control over all the estate is to be bounded by the law only, and that this arrangement is not to be considered as extant until the moment when its provisions are to take effect, and then my own estate shall be answerable for them.

“The law provides for the distribution of my estate, at the least the advantages it gives her shall be fully preserved to her.

“Finally, no debt of mine shall affect her estate, which shall have priority to all other claims upon my property.

“B. CHEW, JUN.

“Done 10th July 1816, at Philadelphia.”

Indorsed—“July 10, 1816. B. Chew, Jun.’s proposals to W. Tilghman, respecting his daughter’s property.

“Mem.—Instead of these proposals, W. T. drew others more favourable to Mr Chew, which were assented to by Mr Chew. These writings are dated July 10, 1816.”

Mr Rawle, Jun., for complainants.

The conversation between Mr Tilghman and Mr Chew, Senior, as detailed in his deposition, was not a contract for a marriage settlement, but was merely preliminary to the one made on the 10th July following; which having been assented to by all parties, was a substitute for what had been before in contemplation, merging any agreement which could be inferred from it. Taking the agreement as now set up, it has no mutuality. Mr Chew claims the 30,000 dollars as payable to himself for his own use, while he would hold the Jersey farm in fee, and receive the interest of the 25,000 dollars

[*Tilghman and Wife v. Tilghman's Executors.*]

without any obligation by him or his father to provide for the widow or the issue of the marriage, in case they survived him, thus leaving both sums at his disposition. The subsequent agreement of Mr Chew, Sen., that in case of his son's death he would continue the same provision for the issue as he had made for his son, still left Mrs Chew wholly unprovided for; it never could have been intended by Mr Tilghman to give 30,000 dollars for a consideration so precarious and unequal. He was at liberty to raise that sum as he pleased, to settle it as he might think proper, with a reversion to his own family, as was the case with the portion to be given by Mr Chew, if his son died without issue of the marriage. The letter of 10th July shows that the fund was to be raised out of the daughter's property; that letter does not bind Mr Tilghman to pay any thing of his own; it was the only contract between the parties, the completion of which was prevented by Mrs Chew's death without any act or default of Mr Tilghman. It could not be done before she was twenty-one, and as her estate was to create the fund, it required hers and Mr Chew's deed to do it. Mr Tilghman was not answerable when this became impossible by her death, 1 Bac. Ab. 139; Fonb. ch. 6, sect. 2; 2 Pow. Cont. 19, 20; 2 Freem. 35; Finch 445; Skinn. 287, or bound to do any act towards performance till requested by Mr Chew. Mr Chew had not performed his part of the contract, and cannot claim a specific execution by Mr Tilghman, nor can he connect his claim under the agreement, with the sales made by Mr Tilghman under the act of assembly; as the real estate, if unsold, would go to Mr Chew's heirs in case of her death, and if sold, the proceeds were directed by the law to be paid to such persons as would have been entitled to the estate, if it had remained unsold, 4 Dall. L. 463, sect. 4, or if sold subject to a ground rent, the reversion was to her heirs. Ib. 464, sect. 5.

Mr Chew cannot claim under the verbal agreement and the letter of the 10th of July, but must make his election, as they are widely different. He cannot take the legacy under the will, without abandoning the present claim, as it will absorb the whole residuary fund and defeat the intentions and express dispositions of the testator; a man cannot take a benefit under a will, and defeat one of its devises, 2 Rop. on Leg. 378, 383; 15 Ves. 391, n. Mr Chew must fulfil the directions of the will, or refund what he has received under it, 2 B. C. 600, and having undertaken the execution of the will, he must perform all the trusts thereof. His claim is barred by the lapse of time, Mr Tilghman denied the claim in 1818, which was not re-

[Tilghman and Wife v. Tilghman's Executors.]

peated by Mr Chew during the lifetime of the former, nor was any notice given to him that it would be asserted ; the declarations of Mr Chew to third persons, that he intended to claim the debt, can have no effect on the case. Besides, he has bound himself by signing the petition to the legislature in March 1818, for a sale of the lands out of which the fund was to be raised, in pursuance of which, Mr Tilghman was authorized to make sale thereof for the benefit of his grandson, or such persons as were entitled to the reversion.

Mr J. R. Ingersoll, for Mr Chew.

Mr Tilghman was bound to provide and place in the hands of Mr Chew 30,000 dollars, the contract was confirmed by the marriage, which fixed his liability ; he received an equitable equivalent in actual pecuniary advantage, the claim has neither been discharged or waived, it was valid against him during his life and is a charge on his estate, which equity will not take out of the hands of Mr Chew till it is paid. There are besides equitable grounds for enforcing this claim independent of the marriage contract, arising out of sales made of Mrs Chew's real estate, from which Mr Tilghman received, beyond the amount of the post obit bond, about the amount of the promised portion. Equity, looking to substance, not form, will inquire whether the whole case makes out a contract which is binding in conscience and good faith, 1 Pow. Cont. 189, and supply all defects in form, Fonb., b. 1, ch. 1, sect. 7, or mistakes in drawing the paper, 2 Vern. 480 ; it will take both the verbal and written agreement into view, and make one contract, if either or both import one. The verbal contract was full and complete as the basis of the proposals of Mr Chew, Jun. to settle the 30,000 dollars on his wife and children, which brought out the substitute of 10th July, but for which, Mr Tilghman would have remained liable under the verbal contract.

He considered this substitute as better for Mr Chew than his own proposals, as appears by his indorsement, and they must be so construed in equity. The paper of July refers to the previous conversations admitting an obligation to provide the sum first stipulated ; it proposes to do it out of the daughter's estate, but it is an undertaking by Mr Tilghman to raise the 30,000 dollars, without any act to be done by Mr Chew or his wife. It was a boon asked by Mr Tilghman, to release himself and estate from the obligation of the contract, by raising her portion out of her property, not by an immediate sale, but after she was twenty-one ; the letter of 10th July is a guarantee that she should then confirm the contract ; if she refused or neglected, Mr Tilghman

[*Tilghman and Wife v. Tilghman's Executors.*]

remained liable on his original undertaking. In agreeing to this proposal, Mr Chew stipulated only for his own performance, not hers, though his joining might be necessary, yet as he did not promise for her, the risk was Mr Tilghman's, not Mr Chew's. Mr Chew had then no interest in the property, as Mr Tilghman was tenant by the curtesy, so that his deed could give no effect. Before he could have any interest, his wife must be seised in deed, Co. Lit. 29, a, if of a reversion, the particular estate must determine during coverture, his seisin must be of an immediate freehold or the inheritance to give him any interest. Her deed, therefore, would have availed on the same rule that a fine levied by a feme covert is good to estop her, though not her husband, Hob. 225; but as he was estopped by his assent, her deed would have made the title good. A feme covert may release dower without her husband joining, and may do by deed here whatever she may do by force in England; the only difference is, that here the separate acknowledgement must be set out. Had Mrs Chew died before coming of age, the performance of the agreement of July would have been impossible by the act of God, but as she arrived at twenty-one, when the condition could have been performed, the contract became single, as there was no default in Mr Chew, 2 H. Bl. 178. The default was in Mr Tilghman, for he took a deed of confirmation of sale made by him, from Mrs Chew in May 1817, after she became of age, and no reason has been shown why he did not also procure her deed confirming this agreement. In this agreement the promises of Mr Tilghman and Mr Chew, Sen. were the consideration, not the performance on either side; it is not the case of precedent or concurrent conditions, on the performance of which by one party the obligation of the other depends, but a marriage contract in which the issue of the marriage being interested, the default of one party will not exonerate the other, 1 Pow. Cont. 261; 2 Pow. Cont. 18, 19; 1 Ves. Sen. 377, 378; here it was in the power of Mr Tilghman to have had the agreement perfected, he is consequently entitled to no relief against his own default. 1 Fonb. 391; 2 Freem. 35.

The agreement of July was only a modification of the verbal contract, as to the mode of settlement, the nature of the estate of Mr Chew, and the substitution of the daughter's for the father's property to raise the fund, which were the attributes or incidents, the mode of carrying the contract into effect, not the contract itself. That was neither extinguished or superseded, it bound Mr Tilghman to make the provision out of his own estate, if it was not done from the daugh-

[*Tilghman and Wife v. Tilghman's Executors.*]

ter's ; Mr Chew has a right to rely on both agreements as evidence of the one contract, he cannot give any evidence to contradict his answer, or claim any relief not asked for ; but as he is a defendant asking only to be dismissed, the same strictness as to averments is not required, as if he was a plaintiff. 2 Anst. 397, 491. It is enough that the answer discloses the whole case, relying on a debt or duty existing before the 10th July, which must be discharged in some way, several deeds made at the same time, on the same subject, are but one, 1 Fonb. 436 ; 1 B. C. 14 ; 17 Serg. & Rawle 110. The answer is explicit in relying on a contract, an agreement in consideration of marriage, it is fully proved, whether completely made at one, or different times is not material, it was in part performed on the part of Mr Chew, Sen. who might take a year to complete it, as no time of performance was fixed. It was not material whether it was completed before or after the marriage, as was decided in *Magniac v. Thomson* (ante, p. 344), or whether the fund was to be raised from the father's or daughter's estate, as she was his only heir, unless he survived her, in which case his estate must do it. The post obit bond had no connection with this contract, as it was for money then due by Mr Tilghman, for the lands sold.

Proposals in writing by the friend of a suitor to the friends of the woman, though no answer is returned, if a marriage ensues, are an agreement executed, binding on all sides, 15 Vin. 282 ; W. Pl. 1 ; Finch 146, so when it was done by a letter, and the offer in part performed or the marriage assented to, or no dissent expressed, 2 Vin. 322, 373, the party is not deprived of the benefit of the contract, though he receives a legacy left him by the will of the party bound, it will be presumed to be given from affection, and not in satisfaction. 15 Vin. 282.

Mr Tilghman could not revoke this contract by his memorandum of May 1818, the consideration was a continuing one, and good to support any promise after marriage, 2 Salk. 96, the advance of money to buy furniture shows Mr Tilghman's understanding that he was personally bound by the contract, of which it was a confirmation, as was the giving possession of the Northampton farm after August 1818, and the giving and accepting the deed of the Longbride farm in May 1817.

As marriage was the consideration of the contract, it was complete on that event, so as to be in no wise affected by the death of Mrs Chew, which was provided for in the agreement of the 10th July, a right to

[*Tilghman and Wife v. Tilghman's Executors.*]

the promised provision accrued on the marriage, it was a debt due to Mr Chew continuing till satisfied, he became a creditor to the estate of Mr Tilghman, entitled to his debt as well as any legacy left him by the will. In 3 Ves. 466, the supposed rule that a legacy extinguishes a debt, is called an absurd one; here the will directs debts and legacies to be paid, in such cases both must be paid, 1 P. Wms 408, so in any case where the legacy is less than the debt. 2 Madd. Ch. 36; 2 Vern. 498; 2 P. Wms 553; 11 Ves. 544. It is a rule that a party cannot claim in repugnant rights under and against a will, if he claims under it, he must claim under the whole taken together; 1 Thomas's Coke 454, 525; 1 B. C. 492; 2 Ves. 560, 693, 696; as when a testator devises property which is not his own, and gives an equivalent to the owner, he shall be put to his election, if he accepts the equivalent he must relinquish what has been devised to another. Atk. 182; 2 Ves. 696; 4 Ves. 531; 9 Ves. 533; 13 Ves. 220. Here, however, there is no repugnancy, the will charges the whole estate with both debts and legacies, without any direction that the legacy shall discharge the demand, in such cases a party is not put to his election; 1 Atk. 509; 2 P. Wms 553; nor unless there is a plain interest, or necessary implication in the will that the legacy shall be a satisfaction; 1 Ves. 523; 1 Ves. 265; the presumption is against the extinguishment of a debt; 3 Atk. 67; the legacy must be given for such purpose or the debt remains, 1 Ves. Sen. 636; and unless the will directs it, a creditor cannot be put to his election. 2 Madd. Ch. 42; 12 Ves. 154.

The receipt of the legacy being no bar to the debt, its obligation on Mr Tilghman is not impaired by his omission to provide the fund when it was in his power; it is in clear proof by Mr Chew's declarations, that he never abandoned the claim, in his answer he states that Mr Tilghman promised to pay interest on what was due. This averment is not contradicted, and is evidence, though not directly responsive to the bill; for the bill referred to the whole subject matter of the claim of Mr Chew, as to which he was called on to answer particularly. As it cannot be pretended that it was the intention of the parties, that Mr Chew should be unprovided for, by the failure to make the contemplated settlement in Mrs Chew's lifetime, equity will decree an equivalent, Fonb., b. 1, ch. 6, sect. 9, so that the intended object shall be effected. In addition to this consideration, there are two contracts, which must be executed unless they have been dissolved by the parties who made them; the agreement of the 10th July did not merge the previous one unless it was consummated, its

[*Tilghman and Wife v. Tilghman's Executors.*]

failure left the former in full force, Mr Chew's assent to it as a substitute, was to it when executed, not to take the promise as actual performance.

The lapse of time as an equitable bar, is fully accounted for by the situation of the parties towards each other, the events following the marriage and the declaration of Mr Tilghman of his inability to pay the amount without selling his house over his head, stated by Mr Chew in his answer responsive to the bill. The time for performance was indefinite, after Mrs Chew became twenty-one, time is therefore no statutory limitation, it does not run against an executor nor is he bound to plead it; 1 Atk. 524; 15 Ves. 498; a party who wishes to avail himself of time as a bar, must plead it, insist on it in his answer, or by a special replication. 1 Atk. 493; 2 Mad. Ch. 244.

Equity considers that as done which ought to be done, the marriage fund was in the hands of Mr Tilghman in his lifetime, Mr Chew now holds it, equity will decree his retention of it according to the original intention of the parties; 2 Com. Cont. 406. Mr Chew is a creditor whose debt is not extinguished by being an executor, retaining for his own debt is consistent with a due course of administration, the complainants are volunteers, conditional legatees. The claims of justice and cravings of bounty can both be satisfied out of the estate, by decreeing to Mr Chew the use of the fund for life, on giving security for its payment after his death, when the complainants will be entitled to its ultimate enjoyment.

Mr Binney, for complainants.

The plaintiffs claim legacies left them by the will of Mr Tilghman and offer refunding bonds, payment is resisted by one executor on account of a debt due to himself; the case comes before the court as on a declaration and plea in bar, presenting a definite issue, on the decision of which the allegations of the answer are not evidence, because not responsive to the bill.

The bill suggests the claim of Mr Chew as the plaintiffs understood it, the answer sets it up under the agreement of July 10th 1816, and no other, and it is set out specially; the part performance relied on, the breach, the stipulation creating the alleged debt, are all referred exclusively to this agreement, with a denial that it was relinquished, or that the defendant ever agreed to the memorandum made by Mr Tilghman in May 1818. The answer alleges also, that the agreement of July was left in the hands of Mr Tilghman,

[*Tilghman and Wife v. Tilghman's Executors.*]

as the contract between them, and that Mr Tilghman received more money from the estate of Mrs Chew than was required to make up the sum agreed to be settled.

This is the case to which the defendant has sworn, the court can decide on no other, 4 Wash. 224; 6 Johns. Rep. 543; for if after failing to establish what is sworn to, a defendant can rely on other matters, his conscience is not in his answer; the decree must be on the matter sworn to in the answer, which is denied by the general replication. The claim is made by Mr Chew in his own right, not in right of representing his wife, he can make no claim under the act of 1818, as Mr Tilghman was accountable to the owners of the reversion after his death, nor under the act of 1799, as his heirs were bound to pay Mrs Chew, if she arrived to twenty-one, or to the heirs of Mrs Tilghman in case of Mrs Chew's death without issue.

The claim is a stale one, and the less to be favoured by concealing it from Mr Tilghman, while a declaration was made to others that it was intended to be made, as he was not put on his guard, so as to meet it by evidence, or to deny it by his answer. The purchase of furniture was no part performance of the contract of July, for it contained no reference to furniture, the possession of the farm was gratuitously given on account of the child, as appears by the letter of Mr Tilghman in August 1818. The averments in the answer that it was on account of interest are not proved, and so not evidence; we may use the answer to show the admissions of Mr Chew, but are not bound by its assertion of any thing against us, because they contain affirmative matter, not as a defence to the bill but in support of a claim in bar.

The defendant must prove the contract he sets up in his answer, proof of a different one is not admissible, or if received, the decree is erroneous. 5 Johns. Rep. 543; 1 Pet. C. C. 381; 9 Cranch 19; 10 Wheat. 181. We come prepared to meet the alleged agreement of the 10th of July, and not the verbal one which was in conflict with it, if there was a modified agreement compounded from the two, it is neither proved or set up in the answer, so as to admit evidence touching it, and the answer avers it to be different from the one made in July and ratified by all parties in August. This was the only modified agreement, on the defendant's showing, on which there is any pretence for a claim. The verbal contract, taken as proved by Mr Chew, Sen., is too vague for any decree to be made upon it, the promises were by Mr Tilghman to make up 30,000 dollars for his daugh-

[Tilghman and Wife v. Tilghman's Executors.]

ter, and by Mr Chew to make up the same sum for his son. Neither was to provide for the child of the other, a settlement on the daughter out of her own estate would have been a compliance with the promise. The paper of July contains no promise, but merely a declaration of the mode of raising an income, on which no debt can arise or a claim for damages be founded, the answer states no facts from which a duty can be inferred, it does not aver the daughter's consent, any offer or demand of performance by Mr Chew, or any refusal or default in Mr Tilghman, no covenant, guarantee or engagement that the daughter shall execute the necessary deeds, nor any personal liability assumed by him on her default. It was necessary for Mr Chew to join, for the remainder in fee being in her, her deed alone was void, 2 Rop. on Prop. 97; Atherly, ch. 2; no purchaser would have taken hers and Mr Tilghman's deed, and as Mr Chew had not offered to join, he has no claim; the acts required to perfect the agreement were concurrent in both parties, and neither can recover for a breach without averring and proving performance or offer to perform, though it is otherwise as to independent covenants. 2 Saund. 352, a., n. 3; Doug. 691. Both parties took the risk of Mrs Chew's death, the party desirous of performance was bound to hasten the other by a request, if either is in default in law, he can have no claim in equity; here the defendant is in the position of a plaintiff, bound to make out a clear case of a debt due, or a duty assumed by Mr Tilghman, binding on him and his estate.

The agreement of July is an informal one, which equity will mould by the exercise of its largest powers, in order to effectuate the intention of the parties by making a limitation in strict settlement, or in providing for the issue, contrary to the words of the agreement, if such appears to have been the object of the agreement. Here it was only a provision for the marriage, not looking to the issue or the death of either Mr Chew or his wife, no estate in trust was created, the fund was to be raised by a sale, it was for the use of the wife, and chancery would make such a decree as would secure it to her and the issue of the marriage. The only act required from Mr Tilghman was a deed conveying his estate by the curtesy, Mr Chew and wife owning the estate in fee could complete the settlement, it has failed by the common default of all parties without any demand of performance by either, of course, without liability for the consequences.

The judges delivered separate opinions.

[Tilghman and Wife v. Tilghman's Executors.]

BALDWIN, J.

The alleged contract between Mr Tilghman, and Mr Chew the defendant, consists of two parts: 1. The conversation between Mr Tilghman and Mr Chew, Sen., communicated to Mr Chew, Jun. ; 2. The letter of Mr Tilghman of the 10th of July 1816, assented to by both the Messrs Chew. Taking the conversation as a verbal agreement, it was a mutual promise that each should provide for his own child a portion of 30,000 dollars; no fund was designated out of which the portions were to be raised on either side, except as to 5000 dollars by Mr Chew, by conveying a farm in Jersey to his son; neither party assumed any obligation to provide for the child of the other, referred to any provision for the issue of the marriage, or any limitation or mode of settlement of the respective portions. The object seems to have been a personal provision for the parties to the marriage, to be made separately by their parents, each taking on himself the raising their portions for their own use, neither promised that the child of the other should have any interest in his own child's portion during the marriage, or after the death of either. The promise of Mr Chew, Sen. to make the same provision for the issue after his son's death, as he was to make for his son in his lifetime, formed no part of the conversation before the marriage, but is admitted to have been made afterwards; that promise however did not extend to Mrs Chew if she survived her husband, and as the Jersey farm was to be conveyed to Mr Chew, Jun. in fee, she could have only her dower out of it. The declaration by Mr Chew, Sen. of his intention to make the same provision for his son's family by his will, as he would have made for his son if living, was also after the marriage, and in consideration of the agreement of the 10th of July; so that previous to that day, there is no evidence that Mr Tilghman had made any promise or agreement to give the defendant any interest in his wife's portion, or to so settle it on her as to give him any control over it. The extent of any obligation assumed, was to give or make up to his daughter the stipulated portion; in law the defendant was no party to this promise so as to sustain an action for it, but even if he had any legal right to it, a court of law must award it to him absolutely, having no power to compel him to settle it on his wife or children.

This promise therefore could create no legal debt due to defendant or give him any claim to damages for its breach at law, it must be treated as other contracts for the payment of money or the perform-

[*Tilghman and Wife v. Tilghman's Executors.*]

ance of collateral acts. A plaintiff must show his interest in the act to be done, its extent, the breach of the contract, with the amount of damages he has sustained thereby; these would be insuperable obstacles in the present case (conceding the verbal agreement to be fully proved and clearly broken) to a recovery at law. It is only in a court of equity that all parties in interest could apply for the apportionment of a fund, to which no party had an exclusive right, but even there it would be difficult if not impracticable to give the present defendant any relief. The contract is so vague and indefinite in most of its important parts, that if the decision in this case turned upon it, "this defect in the proof would be fatal to the claim of the defendant." The contract sought to be enforced ought to be clearly proved, its terms to be precise, so that neither party could reasonably misunderstand them, if it is vague, uncertain, or the evidence insufficient, a court of equity will leave the party to his remedy at law. *Colson v. Thompson*, 2 Wheat. 341.

Contracts in consideration and contemplation of marriage are binding in law and equity, yet they must have those attributes which will alone induce courts of equity to decree a performance variant from its terms. In this case the promise of Mr Tilghman was not made to meet any stipulation made by Mr Chew in favour of the intended wife, each parent was free to have made a settlement on his own child of their respective portions with a reversion to themselves and their own right heirs, which equity would not disturb in the absence of any agreement to the contrary. Marriage agreements are construed in equity most liberally in favour of the issue of the marriage, who are considered as purchasers incapable of taking care of themselves, equity will protect them under marriage articles limiting an estate tail to the parties to the marriage, by decreeing to them an estate for life only, with a remainder to the issue in strict settlement; 2 Vern. 658; 1 Ves. Sen. 239; 2 Atk. 40; 2 Johns. C. 222; 1 Dess. 443. But this rule does not apply to the parties, unless by the terms or manifest intention of the agreement they appear to have an interest in the fund to be provided. In this case there seems to me to be no such agreement or intention, but if Mr Chew, Sen. had promised to give to his intended daughter-in-law a life estate in his son's portion if she survived him, there would have been powerful reasons for holding Mr Tilghman bound to make an equivalent provision for his intended son-in-law. This would make the promise mutual, whereas all mutuality would be wanting by holding him

[Tilghman and Wife v. Tilghman's Executors.]

so bound by the contract as stated and proved. It is not in equity a necessary incident to a marriage contract that the husband should have any interest in the wife's portion, when she has none in his, or that the survivor should have a life estate in the other's portions; this will not be decreed unless agreed upon, or necessary to carry the contract into effect on principles of justice and equity.

In my opinion this contract created no debt or duty on the part of Mr Tilghman which can be enforced in equity, for the want of precision in its terms, and the want of a promise by Mr Tilghman to make a personal provision for the defendant, in both which respects the contract is defective.

The next inquiry is, whether the verbal contract formed a part of the written one of 10th July, or whether the latter is to be taken as the final agreement of the parties, complete in all its stipulations according to their intention therein expressed, and a substitute for the verbal one as contended by complainants, releasing Mr Tilghman from all personal liability. On the other hand, the defendant contends, that there was an existing liability in Mr Tilghman, continuing after the 10th of July, until that agreement was performed, the risk of which was assumed by him, who remained liable under the first contract, when the second failed by his daughter's death.

It is difficult to account for the written proposition of the defendant which led to the contract of July, if there had been a subsisting contract made, definite and precise in its terms; the subject matter was not a provision to be made by Mr Tilghman for his daughter or her intended husband, or a conveyance of his property for the purpose, but her real estate which was to provide the marriage portion. On this subject the verbal contract was silent, as well as on the nature of the limitations. Had the defendant's proposition been accepted, he would have been without any interest in his wife's portion, in the event which has happened, which is inconsistent with an existing obligation in Mr Tilghman to give it to him absolutely or for life, or the existence of a contract so definite as to be visible or tangible in a court of equity, as to give him any right. It remained then for the parties to make a contract specifying the fund for raising the portion, with such a limitation as would give the defendant an interest in it; this was intended to be done by the agreement of July, which is full and complete in all its parts; referring to no previous contract to be modified, it fully expresses the intention of the parties. So far as it accords with the previous inchoate contract, it reduces it to writing,

[*Tilghman and Wife v. Tilghman's Executors.*]

which, in the absence of fraud, mistake, ignorance or latent ambiguity, cannot be varied, impaired or explained by parol evidence, 2 Call 12; 4 Dess. 211; 3 H. & M. 416, 417, or stating circumstances previously to the writing, 8 Wheat. 208, 211; if it differs from the terms of the conversation, the writing is a declaration of a change of the original intentions and an agreement to alter and rescind them. 1 Fonb. 173, 174; Tal. 20; Amb. 317.

This conversation between Mr Tilghman and Mr Chew, Sen. can be viewed only as leading to or forming the basis of the writing, or as a distinct substantive contract between the parties, put into writing as marriage articles; in either case a decree must be made conformably to the construction of the written agreement, or it must be reformed according to the rules of equity, by something which more correctly indicates the intention of the parties than the agreement itself. Otherwise it must be taken to be the only and very contract subsisting between them. Any contract, however solemn, may be reformed by matter of higher consideration than the contract, but this power of reformation is limited; there must be something definite by which to reform a contract, it must refer to or recite some other agreement on which it is predicated, which it was intended to carry into effect, to which it must conform, and by which it must be controlled, construed or regulated.

Articles in consideration of and previous to marriage, are considered in equity as the heads of an agreement for a valuable consideration, 2 Atk. 40; 3 H. & M. 406, they will be so construed as to carry into effect the intention of the parties for the benefit of the issue for whom they are purchasers, 11 Ves. 228; 2 Dess. 126; 1 Dess. 443; 3 Ves. 245; 18 Ves. 54, any mistakes will be corrected by reforming the article or settlement. A settlement after marriage, reciting articles before marriage, may be reformed by them; so if it was intended to be pursuant to the articles, any variance between them being presumed to be by accident, Tal. 20, 181; 1 Ves. Sen. 239; 2 P. Wms 349, 356; 3 B. P. C. 333, 334; 1 P. Wms 123; Com. 417; Amb. 317; 2 Vern. 658; 3 H. & M. 408. But the evidence of intention by which to make the reformation must be by a recital, a letter of instructions or declaration of intention, not by conjecture, but in words showing it, 1 Ves. 59, 151; 5 Ves. 597, n., 600; 3 Bro. Cha. 27, otherwise the variance is presumed to be by a new agreement, 1 Fonb. 173, 174; Tal. 20. The great object of marriage settlements, is to restrain the parties from disposing of the

[*Tilghman and Wife v. Tilghman's Executors.*]

fund to the prejudice of the wife and issue, and it is in their favour and necessarily against the husband, that equity reforms and construes them liberally to embrace the object intended ; this will be done in favour of the husband or wife, where they claim in consideration of a settlement made, or to be made by them or their friends, so as to make the contract operate beneficially for the party intended to be benefited by it, 1 Munf. 98, 112, 390. But if the plaintiff in equity has not completed his promised provision for his wife and issue, or if by her death without issue he has suffered no prejudice by what he has done towards its completion, or if by the agreement the portions were to be equal, and the husband has not made up his, equity will leave him to his legal remedy, 2 Freem. 35, 36 ; 3 Ves. 246.

If an instrument professing or intended to carry an agreement into effect, is so drawn by mistake as not to effect the object, it will be reformed in conformity therewith ; the instrument being insufficient for the purpose intended, the agreement is considered unexecuted, and the delinquent party will be held to its performance. If however the parties have deliberately agreed on an instrument to effect their intention, which meets the views of both, it becomes incorporated into their agreement, and if not founded in mistake in fact, and is executed in strict conformity with itself, equity will not decree another security, or act as if it had been agreed on or executed. It will compel the execution of agreements fairly made, but will not make them for parties, or decree the execution of any other instrument than the one agreed on. The death of the party who was to execute the instrument which was to give efficacy to the agreement, though it frustrates the intention of the parties by an event not provided for, does not alter the case. Where the parties have on deliberate advice rejected one instrument and adopted another, equity will not decree a different one to be executed, or that to be done which the parties supposed would be effected by the instrument finally agreed upon. *Hunt v. Rousmanier*, 1 Pet. 9, 17 ; 8 Wheat. 201, 210, S. C.

In the application of these principles to this case, I can perceive no just ground for reforming the agreement of the 10th of July ; from its terms it appears to have been the only agreement intended to be carried into effect, so it appears to have been considered by all parties by their subsequent conduct, and having been deliberately made, must be considered as the only foundation of defendant's claim. It is so set up in his answer and expressly stated, that though it

[*Tilghman and Wife v. Tilghman's Executors.*]

varied essentially from the verbal contract, it was assented to by all parties, and left with Mr Tilghman for safe keeping as the contract agreed upon; such is the case presented by the answer, on which the issue is depending on the general replication. This issue is on the facts and case stated in the answer, not on any other matter which may be offered or given in evidence at the hearing. 4 Madd. Rep. 21, 29; 3 Wheat. 527; 6 Wheat. 468. The opposite party must have notice by the answer of the matters relied on, so as to shape his replication accordingly, and offer countervailing evidence; he is not to be taken by surprise, or lose the opportunity of asking leave to file a special replication, which cannot be done without leave. 2 Wheat. 380; 1 Pet. C. C. 351. The same rule applies to a bill, so as to enable a defendant to demur, plead or answer, according to the case stated, 1 Munf. 395; 7 Ves. 457; 12 Ves. 79; 9 Cranch 25; 10 Wheat. 188; 6 J. C. 349. A party who sets up a right against another, must be confined to the allegation of his bill or answer, the court will permit no evidence of any other matter than such as tends to prove those allegations, or decree on any thing not put in issue or admitted by the pleadings, 1 Pet. 612; 1 Pet. C. C. 383; 11 Wheat. 108; 6 J. R. 559, 563. The defendant's counsel contend for a broader rule in case of an answer than a bill, where the answer is merely a defence against a right asserted by the plaintiff, as in a tithe cause, where it was held sufficient to set up a composition or commutation generally as a defence, Anst. 404, 491. Cases of this description are exceptions to the general rule, on account of the difficulty of definite proof, but where a defendant in his answer, goes beyond mere matter of defence, and sets up an affirmative claim, he becomes a plaintiff and must make out his case by proper allegations and corresponding proofs.

Such is the present case, both parties are claimants of the same fund, one to recover, the other to retain; the only ground of denial of the plaintiff's claim, is an assertion of an affirmative claim by defendant in virtue of a contract set out in the answer, both parties being actors in their own adverse right, we must decide as if the defendant's case was in a bill filed by himself.

Taking then the agreement of the 10th of July as the contract relied on for the foundation of the defendant's claim, it will be considered according to the intention of the parties, without regard to form or manner of expressing it, as a contract or articles of marriage formally executed, as a valid binding agreement or covenant to be exe-

[*Tilghman and Wife v. Tilghman's Executors.*]

cuted according to the principles of equity, regarding only its substance. The marriage having been solemnized, is a consideration which entitles the defendant to the performance of the contract in good faith, for which the estate of Mr Tilghman is answerable, if its breach has been by his default, or its non performance has been owing to the occurrence of any event, against which a court of equity can properly consider him as having undertaken to provide.

It was stipulated that so much of the daughter's estate be sold, after she would arrive at twenty-one, as would raise 30,000 dollars, which would be in nine months after the date of the agreement; no time was limited in which it was to be done after she arrived at twenty-one, the sale could not be before, for although Mr Tilghman by the act of 1799 could sell, he was bound to appropriate the proceeds in the manner pointed out by that law. The postponement of the sale was from necessity, not for the convenience of Mr Tilghman, the annual value of the estate was trifling, neither party by the terms of the agreement assumed the risk of the settlement being defeated by the death of the daughter, nor is there any principle of equity which would make Mr Tilghman personally answerable for the consequences. That does not seem to have been contemplated at the time, it was a proper subject for a provision, had any been intended, the object was a provision for the marriage, this agreement was agreed on for security of its performance, deliberately made and accepted as satisfactory. Had it been intended to substitute the estate of Mr Tilghman as the fund in place of the daughter's estate in the event which has happened, it would have been so stipulated, or such intention have been manifested; had it been intended to bind the estate of the wife, she would have been a party. The defendant's proposals immediately preceding the contract were, that if no issue survived her, he would renounce the tenancy by the curtesy, and all legal right to his wife's personal estate, the same provision was to take effect on the subsequent death of the issue who should survive her. This proposal met the very case which has occurred, and negatives the belief, that in the same event, Mr Tilghman was personally to be bound, or that a stipulation to that effect was left out of the agreement by accident or mistake; it must therefore be taken as the only security required, the insufficiency of which by the death of Mrs Chew affords no ground for our interference. *Hunt v. Rousmanier* is authoritative on this point.

As the agreement could not be performed before the arrival of Mrs

[Tilghman and Wife v. Tilghman's Executors.]

Chew to twenty-one, no cause of action could accrue till that event, it happened on the 19th of April 1817, she survived it two months, so that there was time to have completed the settlement, yet though arrangements were made as to sales of her property by Mr Tilghman, nothing was done in relation to the settlement, or any offer or demand made to execute it. Its completion required the concurrent act of all parties, of Mr Tilghman to release his estate by the curtesy, of Mr Chew and wife to convey the reversion; the acts must be simultaneous, or the conveyance of the fee must precede the release of the life estate, and the latter, if made to take effect immediately by a separate deed, would have left Mr Chew and wife the sole power of disposing the whole estate, with no other control than by a court of equity in virtue of the marriage articles. Mrs Chew was then under the legal control of her husband, her deed was indispensable, it must be her voluntary act, Mr Tilghman could exercise no control over her, nor could he by his own act complete the settlement. The important question then arises, on whom does the law throw the duty of doing, or offering to do the acts necessary to performance, and what is such default in either party, as subjects him to a debt or damages by non performance, without request by the other, when the contract fixes no time for performance?

An obligation to pay money without naming the time of payment, creates a debt due presently on demand; if for the performance of a transitory act, it must be done in a convenient time without request, when the concurrence of the obligee is not necessary; if it is necessary, the obligee must hasten the performance by a request, or the obligor may take his lifetime. He shall also have a reasonable time after a request, and the obligee shall name a time for performance, as the making a feoffment. If the condition be to infeoff a stranger, the obligor shall require him to name the time and place, and do it in convenient time, unless the act requires the concurrence of the obligee, or of the obligee and stranger, in which case the obligor does not take on himself for the obligee who is party to the deed, as he does in the case of a stranger, 6 Co. 31; 2 Co. 79; Co. Litt. 208, 219; Cro. El. 798; 1 R. A. 436, pl. 1; 1 Brown's C. 55. In cases of forfeiture, the party is allowed his lifetime to perform the act, 1 Call 88, 89; the party who is to have the benefit of the act may do it when he pleases, 3 D. C. D. 103; G. 3, pl. 16; where prompt performance of the act is necessary to give the party its benefits, or its immediate fruition was the motive for the contract, it must be done

[*Tilghman and Wife v. Tilghman's Executors.*]

in a reasonable time, Co. Litt. 208 ; 2 Co. 75, 78 ; Wing. Max. 463, 464, pl. 31 ; 5 Serg. & Rawle 383 ; if to be done on demand, a reasonable time is allowed, 1 R. A. 443, 449 ; 3 D. C. Dig. 104. If the acts to be done are mutual or concurrent, the party who sues must aver and prove performance on his part, or an offer and readiness to do so. 2 Saund. 352, n. ; Doug. 691 ; 11 Serg. & Rawle 200, 352 ; 12 Johns. Rep. 212. Acts to be done by both parties at the same time, are deemed mutual and concurrent, though stipulated by different instruments they are one contract, one is the consideration for the other ; 2 Wheat. 299 ; 8 Wheat. 224 ; a plaintiff in equity must aver and prove the performance of those acts, which were the consideration of the contract to be enforced, 2 Wheat. 344, if the promise is to an intended son-in-law that the father will make for his intended wife the same provision as he had done for his other children, the plaintiff must aver and prove what that provision was. 1 Call 849. Taking this contract then according to its terms, there was no legal obligation on Mr Tilghman to be the first to move towards its completion, he was in no default without a request by the defendant, nor is there any case made out for equity to interfere, to carry into effect the intention of the parties, to correct any mistakes or cure the effects of any accident.

A different view of the case might be necessary, if the answer could be considered as evidence, so as to put the plaintiffs to disprove the matters set up in support of the defendant's claim, in the same manner as he is bound to do in relation to the denial of the plaintiff's right, according to the rules of equity in ordinary cases.

The defendant is not in this position, in his answer he admits the receipt of money as executor, by which he is bound to the extent of the charges against him ; if in his answer he had averred the simultaneous payment of the sum so admitted, the whole must be taken as evidence, so as to put the plaintiff to disprove the payment. But if the payment or discharge is alleged at a different time from the receipt, or by a distinct transaction, the answer will be taken as an admission of the receipt, but not as evidence of the payment ; so where the answer sets up an affirmative right or claim, as a bar to an account, or to retain the money in the hands of the defendant, he must establish it independently of his oath ; so where he in his answer alleges any distinct independent fact as a bar to plaintiff's claim, 6 Johns. Rep. 559 ; 2 Johns. C. 87, 90 ; Gilb. Ev. 45 ; 4 Brown's C. 75 ; 7 Ves. 404, 587 ; 13 Ves. 53, 54 ; Amb. 589 ; 2 Mad. Ch. 445 ;

[*Tilghman and Wife v. Tilghman's Executors.*]

2 Eq. C. Ab. 247, 248 ; 1 Wash. 124 ; 1 Munf. 395 ; 4 H. & M. 511 ; 1 Ves. 546 ; so of matter of avoidance set up by plea, 2 Wash. 199 ; 1 Johns. Rep. 590 ; 14 Johns. Rep. 74 ; 17 Johns. Rep. 367. An answer is no evidence as to matter not necessarily drawn out by the bill, or not directly charged, if not inquired of or forming part of the discovery sought ; so where the fact inquired into is immaterial, and the answer is a departure from the question, 14 Johns. Rep. 63, 74 ; 1 Munf. 396, 397 ; 10 Johns. Rep. 544 ; 2 Wheat. 383 ; 3 Wheat. 527 ; 6 Wheat. 468 ; 1 Johns. C. 461 ; 1 J. R. 589, 590.

On these well established principles, I have excluded from my consideration all the allegations of the answer to which they apply, and being clearly of opinion that the defendant has not made out his claim on the merits, have not examined into the effect of the lapse of time, or the staleness of the demand. It is proper however to remark, that I adhere to the rule laid down in *Baker v. Biddle*, and had this case required its application, it might have had a powerful if not a conclusive effect.

There must be a decree to account.

HOPKINSON, J.

A primary, and certainly the most important part of the discussion at the bar, has been upon the question, What was the contract of the parties ? Until this is settled it would be an idle waste of time to inquire into the alleged violations. I shall therefore first direct my attention to that question ; and it seems to me that if we trace this marriage negotiation from its commencement to its termination, we shall not be at a loss to discover the intention of the parties in its progress and conclusion. Legal formalities were not regarded, for the whole transaction was governed by a spirit of liberality on both sides, and conducted with that mutual confidence which the situation of the persons concerned in it, and their long and ultimate acquaintance entirely warranted.

The pecuniary arrangements for this marriage began in the conversation between William Tilghman and Benjamin Chew the elder, the precise date of which is not fixed, but we may assume that it was certainly antecedent to the proposals made by William Tilghman and accepted by the younger Mr Chew. It has been so understood in the argument on both sides, nor have we clear and certain evidence of the agreement which is said to have resulted from that conversation. The respondent, Mr Chew, in his answer,

[Tilghman and Wife v. Tilghman's Executors.]

states that the agreement was, that his father should give him land worth 5000 dollars, and allow him annually the interest of 25,000 dollars, and that Mr Tilghman should give his daughter, for her advancement, 30,000 dollars, and that he promised to do on this occasion whatever the respondent's father would do, and more. In the deposition of Mr Chew the elder, he states that he told Mr Tilghman that he would make out to his son a farm in New Jersey which he estimated to be worth 6000 dollars, and immediately after the marriage would contribute and pay to his son 1500 dollars annually in addition. That in consequence of this general information Mr Tilghman stated, without any great difficulty or much consideration, that he would make up the sum of 30,000 dollars for his daughter. If we were called upon to execute this agreement, there would be much difficulty in ascertaining its true meaning in a very important particular, that is, whether Mr Tilghman intended and promised to give to his daughter the sum of 30,000 dollars from his own property, in addition to the estate which would come into her possession at his death, or whether the intention only was to anticipate, in this respect, the event of his death and put her then husband at once into the enjoyment of so much of her property. Many considerations would naturally come into the decision of this question, were it necessary to pass a judgment upon the effect of the conversation alluded to ; but the subsequent proceedings of the parties relieve us from these difficulties. On the 10th of July 1816, the day before the marriage was solemnized, Mr Chew the younger tendered to Mr Tilghman certain proposals in writing, we have them now before us. As they were not adopted, they are of no further consequence at this time than as they may show that Mr Chew the younger did not suppose his marriage contract had been finally arranged and settled between his father and Mr Tilghman, or it is difficult to assign a reason for his making proposals so different from the terms said to have been agreed upon in the conversation between those gentlemen, and without, as far as we know, any consultation or explanation with his father on the subject. The conduct of Mr Tilghman is equally irreconcilable with an understanding on his part that this affair had been settled already ; in which case his reply to these proposals would actually have been that the contract was concluded, and no longer in his power, without the assent of the parties concerned, and with whom he had contracted. So far from this was the understanding of Mr Tilghman, that he did not make the least

[Tilghman and Wife v. Tilghman's Executors.]

allusion to what had passed between him and Mr Chew ; but offers other proposals to Mr Chew *instead of his*, which Mr Tilghman thought more favourable to Mr Chew than his own, and which certainly were so, and which were assented to in writing by Mr Chew. In the course of this negotiation, in which proposals were made by both of these parties, and a contract finally agreed upon and signed, neither of them made any reference to any antecedent contract, but both seem to have considered the whole subject to be open to them, and entirely at their disposal. The assent of Mr Chew the elder was not thought necessary, either to annul the former agreement or to give validity to the new one. If, however, that assent were necessary, it was afterwards fully given. Under such circumstances, I cannot but consider the proposals of Mr Tilghman delivered to Mr Chew the younger and by him formally assented to in writing, as the only subsisting contract between the parties ; as the only contract brought before the court. The respondent has also so considered it, as in his answer this is the contract insisted upon, and for the breach of which he requires redress or compensation. In deciding upon a transaction which took place more than fifteen years ago, it is very satisfactory to have a written document for our guide, rather than the imperfect recollection of conversations, perhaps not fully and mutually understood at the time, and which now are still more uncertain and obscure. On the 10th day of July 1816, the day before the celebration of the marriage between Mr Chew and Miss Tilghman, the father of the lady “presented to Mr Chew, the respondent, a paper to which the respondent gave his assent in writing.” It is in the form of a letter. We must carefully scan the language used, as it was written by one who well understood the force of every word contained in it, and was remarkably precise in all matters of business. It is as follows: “as my daughter, to whom you are to be married is under age, I think proper to mention what I *propose to be done after she arrives at twenty-one* ; and from the conversation we have recently had, I make no doubt but it will be perfectly agreeable to you. In order to *raise an income* we must resort to the *Northampton estate*, which, although valuable, is unproductive in its present state. I *intend* that so much of it shall be sold as will produce 30,000 dollars, of which 5000 dollars may be expended in furniture, and the remaining 25,000 dollars be placed in your hands, to be used by you as you think proper. This *capital* of 25,000 dollars is to be considered after your death as a debt due from your estate. If your

[*Tilghman and Wife v. Tilghman's Executors.*]

wife survives you, she is to receive it from your estate, and if she dies before you she is to have the right of disposing of it as she pleases, either by last will and testament or any writing in nature thereof, or any other writing executed in the presence of at least two witnesses ; but if she should die without making any such disposition, then after your death the said 25,000 dollars are to be distributed according to the law of Pennsylvania, in the same manner as it would be if your wife had died possessed of it and unmarried." This is the proposal, the agreement, the contract, by whatever name it may be called, on the part of Mr Tilghman ; and it seems to me to be hardly possible to raise a question upon its meaning, or even to turn it into any form of expression which will be more intelligible and explicit ; but, if amplified for explanation, does it not amount to this and no more ? You are about to marry my daughter ; you will require money to furnish your house and an income to maintain your family. My daughter has a real estate which is unproductive, and therefore will not furnish the money and income you require, but it is valuable, and if sold and turned into money it will supply your wants. *As she is under age*, this cannot be done at present, but I propose that *after she arrives at twenty-one*, so much of her Northampton estate shall be sold as will produce 30,000 dollars, a part of which, 5000 dollars, shall be applied to the purchase of furniture, and the residue be a capital to produce the income you require.

The agreement or proposal goes on to put this capital of 25,000 dollars precisely in the situation, as to Mr Chew's rights, and the rights of his intended wife, *as it would have been had it remained in real estate*. Is there a word here which intimates even a suggestion that in any event these 30,000 dollars, or any part of them, were to be drawn from the estate of Mr Tilghman ? Is there any thing like a promise on his part, that if, from any cause, the fund which was to produce the money should fail, or the execution of his proposal be prevented, he would make it good from his own property ; he would be responsible to Mr Chew for his disappointment ? I perceive nothing of this sort. That which was to be done to carry this arrangement into effect was not to be done by Mr Tilghman ; was not under his control or power. He could have no part or agency in it beyond his interest in the land to be sold as tenant by the curtesy. Indeed it has been argued at the bar, that he was not, upon strict construction of the proposals, bound to release that. I consider his pro-

[Tilghman and Wife v. Tilghman's Executors.]

posal however as binding him to do whatever should be necessary on his part to execute that proposal, and that it would have been a breach of good faith if he had refused to unite in the conveyance of the land he proposed to sell. This is, however, no question here. It is plain that the execution of the plan or proposal agreed upon between Mr Tilghman and Mr Chew, depended, for its completion, upon the will and the acts of Mr Chew and his wife, and it would be very extraordinary if Mr Tilghman had made it the direct interest of Mr Chew and his wife, not to execute it, by making himself responsible out of his own estate for its failure; for it is contended, that the undertaking of Mr Tilghman that the 30,000 dollars should be raised and paid to Mr Chew, was an absolute promise to pay so much money, to be produced by the sale of the Northampton property, if it could or should be so done, but if not so produced, to be paid by Mr Tilghman from his own resources; in short, that the promise to raise this amount and pay it into the hands of Mr Chew, was absolute and unconditional. If, when Mrs Chew arrived at twenty-one, she should refuse to make the conveyance, without which the land could not be sold and the funds could not be raised, Mr Tilghman was to answer for the default; if by unexpected events the intended sales should become impossible, Mr Tilghman was to indemnify Mr Chew for the disappointment. In the first case it is clear, that while, by the refusal of his wife to sell, Mr Chew would hold the possession of the estate from which the money was to come, he would also be entitled to demand from her father the money. A contract so unreasonable cannot be raised by ingenious arguments and forced constructions; it should appear to be the intention of the parties by explicit and unequivocal terms.

If this be the meaning of the contract, the question occurs, Has it been defeated by any thing done or omitted to be done on the part of Mr Tilghman? *Has it failed by his default*; or has its non performance arisen from circumstances not under his control, and which on the face of the contract appear to be the contingencies, known to both parties, on which its execution necessarily depended? The contract was dated on the 10th of July 1816; Mrs Chew became of age on the 19th of April 1817, and died on the 16th of June of the same year; that is, three days short of two months after she attained her full age. It is expressly stated, that whatever was to be done to carry the proposals into execution, was "to be done *after she arrived at twenty-one.*" If it could be conceded that the en-

[*Tilghman and Wife v. Tilghman's Executors.*]

gagement of Mr Tilghman was absolute, that it should be done after Mrs Chew arrived at that age, equity would nevertheless give a just and reasonable construction to the words which designate the time of performance ; and by looking at what was to be done, ascertain the period of performance, after which a default would be adjudged. The words are, "I think proper to mention what I propose to be done after she arrives at twenty-one." It can hardly be contended that the responsibility of Mr Tilghman, whatever it was, that this should be done, attached on the moment his daughter arrived at twenty-one ; and if this were not the case, but a reasonable time will be allowed for performance, we must find that reasonable time in the nature of the acts to be performed. Here, too, we have the written document for our information and guide. The money to be raised was to be procured by a resort to the Northampton estate ; so much of which was to be sold as would produce \$0,000 dollars. Can we imagine that it was the expectation or intention of either of these parties that this large sum could be raised from these sales in the short space of two months ; and that there was a default in Mr Tilghman in the performance of his contract because it was not done ? Again, it was undoubtedly in the option of Mr and Mrs Chew, when she came of age, to go on to make the sales of land according to the proposal and previous intention, or to retain the land and look to that, or to other resources, for the required income. On the part of Mr Tilghman, nothing could be done in execution of the proposals, but to release his interest in the land, as tenant by the curtesy, and there is no proof or allegation that he ever refused to do this ; that he was ever asked to do it, or that its not having been done formed any impediment, delay or disappointment in making the sales, in raising the money or in defeating, in any respect, the execution of the proposals of the 10th of July 1816. If this be so, the failure in the completion of the design cannot be traced, in the smallest degree, to Mr Tilghman, by his doing or omitting to do any thing contrary to his proposals, even if they may be considered as a contract. This design was defeated by the afflicting death of one of the parties whose co-operation was indispensable ; and it was fully in the view of the respondent, that it could not be executed if that event should happen ; and of course the whole arrangement, the whole plan for raising this money, would necessarily fail if this event should take place before it could be completed. I

[Tilghman and Wife v. Tilghman's Executors.]

may add, that the object and intention of raising it also failed on the death of Mrs Chew.

In my opinion, Mr Chew, the respondent, has not established his right to retain any part of the funds or estate of his testator, William Tilghman, in satisfaction or on account of any claim or demand he has against that estate by reason of any contract, matter or thing set forth in his answer.

THE UNITED STATES v. TWENTY-FOUR COILS OF CORDAGE, ETC.

Cordage, raven duck and sail cloth found on board of a vessel on her return from a voyage, are not sea stores within the forty-fifth section of the collection act of 1799.

If intended for the use of the ship, they are a part of its tackle, apparel or furniture ; if not, they are a part of the cargo.

Mercantile terms used in a law are to be taken in the sense intended, which is to be ascertained by the laws in *pari materia*.

The words of a law imposing a forfeiture or penalty shall not be construed to embrace a case not within the parts of the law which prohibit the act done, or direct the performance of an act, by the omission of which the penalty or forfeiture is incurred.

On an information against specific articles, as *sea stores* forfeited, the court cannot adjudge them to be forfeited as a part of the cargo or merchandise, or as a part of the tackle, &c. of the ship.

THIS was an appeal from a decree of the district court, on an information filed by the United States against twenty-four coils of cordage, three bolts of raven duck, and four pieces of sail cloth, alleged to have been forfeited, by not having been reported on their importation. These articles were found on board the ship *Eliza*, on her return from a voyage to Cronstadt with a cargo composed partly of similar articles, but those in question were not included in the manifest presented on the entry of the vessel at the customhouse, they were seized as sea stores forfeited by the forty-fifth section of the collection act, for not being reported pursuant to the twenty-third section thereof. The only question of law which arose in the case was whether these articles were to be considered as sea stores within the law.

Mr Gilpin, district attorney, for the United States.

The object of the law was to collect a duty on articles, which, under any circumstances could become dutyable, by requiring a report of all stores remaining on hand at the end of the voyage ; the quantity of cordage taken on board for the use of the ship, was more than was requisite for the voyage which was completed, to which the law refers. They are considered as a surplus, though they may be wanted for another voyage. They were entered on the ship's books as stores for the ship, so considered by the mate and the wit-

[United States v. Twenty-four Coils of Cordage, &c.]

nesses, and must be considered as sea stores, unless they are a part of the tackle, apparel or furniture of the ship, as a part of the ship itself. But taken either way, they ought to be reported to the collector, so that he may judge whether they were required for the use of the ship, or were intended for sale; for the intent with which they were taken on board, gives them the character of ship or sea stores, or makes them a part of the cargo.

The term ship or sea stores does not apply merely to provisions for the crew and passengers, they embrace "anchors, cables and other ship stores;" Holt on Shipping 532; Abbott on Shipping 416, ed. of 1829; in a mercantile sense they include every thing for the use of the ship or persons on board, in which sense they are used in the law. When the article is in use for the ship as part of her tackle, apparel or furniture, then it is a part of the ship; but till used, it is a part of the ship, or sea stores.

Mr J. S. Smith, for the claimants.

No article is subject to duty, unless it is enumerated in the law or comprehended in some term which embraces it by necessary implication, otherwise the article is exempt from duty; so where any thing is expressly made duty free, the exemption goes to whatever comes within the description of the article exempted. The exemption of the ship, her tackle, apparel and furniture, extends to every thing necessary to equip and navigate her as a part of the ship itself. The term "sea stores," as adopted in the act of congress, from general acceptation and usage, applies to those things which are for the use of the persons on board, which are consumed in being used by the crew and passengers. Ship stores for the use of the ship are wholly distinct, not being consumed or destroyed by such use, so these terms are used in the law in plain contradistinction.

This being a penal law it must be construed strictly, the information in this case being for not entering these articles as sea stores, cannot be sustained if they are not strictly such; if they are ship stores, and were not intended for the use of the ship, they would be liable to forfeiture as part of the cargo, but not as sea stores. A superfluous quantity does not change the character of the articles, though it might be good ground for the imputation of fraud, whether they are considered as sea or ship stores. Here the information is not against the cordage as merchandise, but as sea stores; the question is not what the mate or witnesses call them, but how they are

[United States v. Twenty-four Coils of Cordage, &c.]

classed by congress; in Abbott and Holt, anchors, &c. are called ship stores, not marine or sea stores. The sails and tackle of a ship are a part of the ship; though they are removed to the shore, they still remain so, and may be seized for sailors' wages; 1 Sho. 177; the materials for the sails and tackle, which are laid in to meet the contingencies of the voyage, are as much a part of the ship as if they had been or were in use, as well as any spare articles actually made up.

The counsel on both sides entered into a detailed argument on the words and provisions of the twenty-third, twenty-fourth, thirtieth, thirty-fourth, forty-fifth, forty-sixth, fifty-second and sixty-third sections of the collection act in support of their positions, which are not reported. They will be found referred to in the opinion of the court, so far as they were deemed applicable to the case.

BALDWIN, J.

These articles were brought into this port in the ship *Eliza*, from Cronstadt, and not reported by the master in the manifest; they were found on board after it was made out, and seized as forfeited under the forty-fifth section of the revenue law, as "sea stores" not specified in the entry, this is the only ground of forfeiture alleged in the information. The case therefore presents the single question whether these articles are sea stores within the meaning of the section of the act of congress; not being alleged to be a part of the cargo, or merchandise belonging thereto, or consigned to the master, officers or crew.

This law does not define or designate what are to be considered as sea stores, as distinguished from articles composing a part of the tackle, apparel or furniture of the ship, or such as may be necessary or usual to have on board, for the purpose of repairs and emergencies during the voyage, parts of which remain on hand at its termination. In directing the form of the manifest, and the articles to be returned, the law enumerates, among others, "the remaining sea stores, if any;" the head under which they are to be entered in the manifest is, "vessel and cabin stores," 1 Story 593, 594, sect. 23; in the forty-fifth section prescribing the forfeiture, they are named as "sea stores" generally, Id. 612. If we were to decide on the meaning of these words in a charter party or a policy of insurance, we might find no difficulty in ascertaining it, by the custom of merchants and the usage of trade and should adopt the meaning and practical definition thus given to

[United States v. Twenty-four Coils of Cordage, &c.]

them; presuming that the parties intended to use them in the sense in which they had been and were used, received and accepted among merchants. But when the words have received a legal and settled interpretation, usage alone would not overrule it. So if the same words are found in a law, and they are used in a sense, denoting the intention of the legislature, to give them an application and meaning, different from that which had been adopted by mercantile usage, the court must so consider the law.

“Admitting that the words ‘sea stores,’ in a mercantile instrument, comprehend all those accompaniments of a ship that are essential in its present occupation (though not direct constituents of a ship), without which it cannot execute its mission, or perform its functions;” it by no means follows, that the words would receive the same construction in an act of parliament, 1 Haggard 122, 124; 4 D. 206, &c.; Marsh. Ins. 626, 627; 1 D. 127, 132; 1 Dow. P. C. 32; 3 Dow. 58, 60. They may be used in a much more restricted sense, which will be taken not merely from particular laws in which they may be found, but from other laws on similar or analogous subjects, which may serve as a key to unlock the law in question; such appears to be the law of 20th July 1790, for the government and regulation of seamen in the merchant service, 1 Story 102. In the third section, it enumerates the several particulars, in which a ship may be defective after the voyage is begun, and before she has left the land, “in her crew, body, tackle, apparel, furniture, *provisions or stores*.” It directs a report to be made, of “what additions of men, *provisions or stores*, or what repairs or alterations in the body, tackle or apparel, may be necessary,” and again uses the words “men,” “*provisions*,” “*stores*,” “repairs or alterations.” In the sixth section, prescribing a remedy for seamen to recover their wages, it directs a summons to the master to show cause why process should not issue against “the *ship*, her *tackle*, *furniture* and *apparel*.” The eighth section directs, that every ship bound on a foreign voyage, shall be provided “with a medicine chest,” the ninth section prescribes the quantity of water, meat and bread, which shall be provided for each person on board, over and besides such other “*provisions, stores and live stock*, as shall by the master or passengers be put on board,” and in like manner for shorter or longer voyages. Taking these provisions of the different parts of this law together, there is an obvious discrimination, between those articles which form a part of the body, tackle, apparel or furniture of a ship, and those intended for the health and suste-

[United States v. Twenty-four Coils of Cordage, &c.]

nance of the crew or passengers; between those necessary for the ship itself, and those who navigate, or are transported in her; between articles which, from their nature, are consumed in their use, and those which become merely deteriorated, or so injured by use, as to require their being repaired or replaced by new materials. The words of the ninth section are a definition of stores, not applicable to any articles laid in for the use of the ship itself, which are not put on board by passengers; they are something over and besides medicine, water, beef, bread or provisions, which are specified in the same clause. From the juxta-position of the word "stores" between provisions and live stock, and their being noticed as put on board by the master "or passengers," they must be considered as intended to refer to other stores, intended for the same purpose and use, as the enumerated articles, provisions and live stock. It would be a very strained, if not a forced construction, to interpret the words "stores," in this section, as referring to the articles on board, necessary or usually taken on board to meet the exigencies of the voyage, for the repairs of the ship, or her security while performing it; this would be to read it, "such other *provisions, cordage, duck, sailcloth* or *live stock*, as shall by the master or passengers be put on board," and thus exclude liquors, groceries, and other articles of comfort, luxury, or fancied necessity, as may have been provided for the officers, passengers and crew of the ship. Such is obviously not the meaning of the law, or the just and legal interpretation of the words used in this section; they clearly exclude the articles in question, they as clearly include all stores put on board, for the purpose of consumption, by the persons in the ship; and they must be taken to have been used in the same sense in the other sections of the same law, in the absence of any words or expressions denoting the intention of the legislature, to give any different meaning or application to them.

In ascertaining the legislative meaning of the term "*remaining sea stores*," as used in the twenty-third section of the revenue law, it is found to be in perfect accordance with the ninth section of the act of 1790, and plainly, if not necessarily, refers to it. It directs a manifest of the cargo to be made out, "together with the name or names of the passengers, distinguishing whether cabin or steerage passengers, or both; their baggage and packages belonging to each, together with an account of the *remaining sea stores, if any*." To the question, What are such sea stores? a plain answer is furnished; such articles of provision and stores, as were put on board by the captain or passengers,

[United States v. Twenty-four Coils of Cordage, &c.]

and not consumed on the voyage, but remaining on hand at its termination.

The words "*vessel and cabin stores*," in the form of the manifest, are not inserted for the purpose of introducing any distinct class or kind of *sea stores*, but merely as the head, under which those designated in the preceding part of the section should be entered on the manifest, as the "*remaining sea stores*." These views of the law are very fully apparent in the thirtieth section, prescribing the form and requisites of the oath of the master to the manifest. "And I do further swear, that the several articles specified in the said manifest, *as the sea stores* for the *cabin and vessel*, are truly such, and were bona fide put on board for the use of the *officers, crew and passengers* thereof; and are intended to remain on board, for the *consumption* of said *officers and crew*." If the ship has on board wines, spirits or teas, the captain is, by the same section, required to report the quantity and kind on board, *as sea stores*, to enter them in the manifest under that head, and to superadd his oath, as in the case of other sea stores on board.

As it cannot be pretended, that the duty of the master under the twenty-third section, is broader than the oath required under the thirtieth, we must take them to mean that the *sea*, the *vessel* and *cabin stores* remaining unconsumed, shall be entered in the manifest, and sworn to, and were such and such only as were provided for the consumption of those on board during the voyage, and should remain on board after its termination, or on a new one. It is therefore clear, that these sections of the law do not embrace those stores which are intended for the use of the *ship* itself, distinct from those provided for the *officers, crew and passengers*, among which the articles in question cannot possibly be comprehended. It only remains to consider the forty-fifth section, under which these articles are claimed by the United States as forfeited. This section is professedly introduced, in order "to ascertain what articles ought to be exempt from duty, *as the sea stores of a ship*;" for this purpose the master is directed to specify them in the manifest, "*as the sea stores thereof*, and in the oath declare that they are truly such, and are not intended for merchandise or sale, whereupon the said articles shall be free from duty." This clause evidently refers to the preceding sections of the law, the one requiring the manifest, the other the oath prescribed as to the articles therein specified as the *stores of the ship*; but it neither embraces any other articles, by any enu-

[United States v. Twenty-four Coils of Cordage, &c.]

meration, reference, or the use of any words admitting of such a construction. The proviso creating the forfeiture, refers to the same subject matter: "and if any other, or greater quantity of articles, are found on board of such ship or vessel as *sea stores*, than are specified in such entry," or be landed without a permit, "all such articles shall be forfeited and seized." Though named in the various parts of the law, as the "*remaining sea stores*," "*vessel and cabin stores*," the *sea stores* of a ship or vessel, "or *sea stores*," their meaning and application is the same as to all these articles put on board by the captain or passengers for their use, or the use of the officers and crew, and intended for consumption on board, they are duty free if entered and verified according to the twenty-third and thirtieth sections of the law. But if the articles, or the full quantity of any given ones on board, are not entered and sworn to, or are landed without permit, they are forfeited; this is consistent with the declared object of the forty-fifth section. It creates the forfeiture, as a punishment for the omission of the duties previously prescribed; to give it any other construction, would be to adjudge a forfeiture of an article, for not doing an act in relation to, which the law did not enjoin any duty, and inflict the punishment, when no offence had been committed.

By no just construction can the penalties of the law be incurred, where no prohibited act has been done, and no enjoined one omitted. The penal provisions of a law cannot be made broader than the directory or prohibitory ones, and we cannot declare an article to be forfeited as *sea stores*, for not being entered and sworn to, unless it is one directed to be so done by some other part of the law. There is no provision in it, which either expressly, or by plain legal intentment, brings the articles in question within them, all the words used can be fully satisfied, without embracing them, and they were obviously intended only for such sea stores, as were taken on board for the use of the officers, crew and passengers.

The district attorney has placed much reliance on the seventh and eighth sections of the English statute of 1 and 2 Geo. 4, ch. 76, in which "anchors, cables, and other ships' stores, materials, merchandize, sea and marine stores," are enumerated together as forming the same class of articles; but although that may be considered as the sense in which they are used, and must be taken in and by that particular act of parliament, it can have no bearing on an act passed more than twenty years before, even in England. It is no evidence

[United States v. Twenty-four Coils of Cordage, &c.]

that such was the legal meaning or acceptation of the words by the common law, but is rather to be considered as a mere statutory provision.

As no doubt can be entertained about the meaning of the act of congress on which this information is made, it has not been deemed necessary to examine the meaning and received acceptation of the terms, "*sea or ship stores*," in mercantile instruments, or according to commercial usage; they are undoubtedly more comprehensive than by the terms or meaning of the laws referred to. It is enough for the decision of this case, that the articles in question are not brought within either the directory, or the penal provisions of the collection law, as *sea stores*; whether they are to be considered as a part of the *ship*, its *body, tackle, apparel or furniture*, being intended for such use; or whether by their not having been so applied, they can be considered as a part of the *cargo*, and as such subject to forfeiture or penalty, under any other provisions of the law, it is unnecessary to inquire. Neither is the object for which they were purchased or retained on board, or their quantity, a material subject of inquiry; if purchased for sale, they would be deemed *goods, wares and merchandize*; if the quantity was excessive, it might be evidence of a fraud subjecting the party to a forfeiture or penalty, at all events the excess would be liable to duty. Having been libelled for being found, on board, as *sea stores not entered* in the manifest, every point in the case is disposed of, by considering them as not embraced within the twenty-third, thirtieth or forty-fifth sections of the law, as *ship, vessel, cabin, or sea stores*.

The decree of the district court awarding restitution to the claimants is therefore affirmed.

Circuit Court of the United States.**PENNSYLVANIA, OCTOBER TERM 1839.****BEFORE**

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

UNITED STATES v. DAVID SHIVE.

It is no cause for a continuance that defendant has not been furnished with a copy of the indictment, and a list of the jurors, if he has not applied for them.

In an indictment for forgery, defendant has no right to peremptory challenges.

The constitutionality of the charter of the Bank of the United States is not a proper subject for the consideration of the jury.

The construction of the constitution of the United States by the supreme court is binding on a jury as well as the court.

THIS was an indictment for passing a counterfeit note of the Bank of the United States.

Mr Phillips, for the defendant, moved for a continuance of the case on the ground that the defendant had not been furnished with a copy of the indictment and a list of the jurors. But inasmuch as it appeared that they had not been applied for, the motion was overruled.

When the case was ordered on, Mr Phillips claimed the right of peremptory challenges.

[United States v. Shive.]

By THE COURT. The state law giving the defendant a right to challenge peremptorily, does not apply to proceedings in this court; forgery is not a felony at common law, and though the act of congress declares the offence laid in the indictment to be a felony, that does not carry with it a right of peremptory challenge as an incident, and it has never been allowed in this court in a case like the present.

The jury were sworn and the trial had. Among other grounds of defence taken by the counsel of the defendant, he contended that the act of congress chartering the bank which created the offence, was unconstitutional, and that therefore the jury ought to acquit the defendant.

BALDWIN, J., after charging the jury on the law and evidence in the case, proceeded to the objection to the constitutionality of the law.

We could have wished that these would have been the only considerations, which it was our duty to submit to you, but one of the counsel for the defendant has raised another question, on which it is necessary for us to give you our opinion, and that is, whether the act of congress on which this prosecution is founded, is valid or void.

That it has passed through all the forms and branches of legislation, that it has been sanctioned and declared to be the law of the land, by the highest branch of the judicial power; that it is clothed with every sanction and carries with it every obligation known to the constitution, has not been and cannot be denied. If there is law in the land, if there is a rule by which courts and juries are bound to administer the criminal justice of the country, it is that which, having been enacted by the legislative authority of the nation, has been solemnly pronounced by the supreme judicial power, to be within the constitutional province of the legislature. Beyond that tribunal, there is no other revision of the acts of congress, that will not end in the prostration of all law and all legitimate government, unless by an amendment to the constitution.

In courts of justice, the law of the land is the law of every case, criminal as well as civil, the safety of the public, the rights of individuals do not depend on their opinion of what the law ought to be, but on what it is. The ministers of justice are not the makers of the laws, judges and jurors are, in the words of the defendant's coun-

[United States v. Shive.]

sel, magistrates to enforce and execute the laws ; they are as much bound by them as the criminal they condemn. We sit here by the authority of the law, our duty is prescribed and defined by law, and if we wilfully violate or disregard it, if we sentence a prisoner without a previous law prescribing a punishment, or acquit in opposition to the enacted and established law of the country, we should be the greatest criminals in the nation. We are judges of law, but what is law ? not the opinions of judges and jurors merely, it is the will of the people, expressed through that department of the government, to whom they have confided the law-making power. An act of congress is the exercise of that power conferred by the nation ; a judgment of the supreme court affirming its validity and decreeing its binding force, is the constitutional exercise of the judicial power of the nation, confided to that high tribunal. And when a law thus carries with it the imposing authority of the people, the states of this union, and of every department of the government created by the constitution, shall the ministers of justice, its sworn administrators, be the first to trample under their feet the supreme law of the land ? Shall we, the creatures of the law, the servants of the constitution, dare to assume the power of abrogating its provisions, disobeying its injunctions, and dispensing with its penalties ?

The sixth article of the constitution, declares itself and all laws and treaties made pursuant thereto, to be the supreme law of the land and that all judges shall be bound thereby, notwithstanding any thing in the law or constitution of any state to the contrary.

When the most solemn acts of a sovereign state, in opposition to an act of congress, are thus declared nullities, will a jury assume no moral responsibility by substituting their opinion for the supreme law of the land ? If the defendant has violated an act of congress though not sworn to make it his rule of action, the supreme law declares him a felon. What are you or we if we put ourselves above it ? The power to judge of the law as well as the fact in a criminal case, is to ascertain the existence of a law, if you see it in the statute book, you cannot on your oaths say there is no such law, or exercise a power denied to the people of a state by the most solemn constitutional provision, declare the supreme law to be void, because it does not comport with your opinion. Should you assume and exercise this power, your opinion does not become a supreme law, no one is bound by it, other juries will decide for themselves, and you could not expect that courts would look to your verdict for the construction of the constitution, as to the powers of the legislative or judicial

[United States v. Shive.]

departments of the government. Nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow citizens or for the court. If juries once exercise this power, we are without a constitution or laws, one jury has the same power as another, you cannot bind those who may take your places, what you declare constitutional to-day, another jury may declare constitutional to-morrow. We shall cease to have a government of law, when what is the law, depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the constitution, expounded by the tribunal to which has been referred all cases arising under the constitution, laws and treaties of the United States.

The counsel of the defendant has referred you to the message of the president, as the true exposition of the constitution in relation to the power of congress to charter the bank. We have no jurisdiction to judge of the propriety of the course of the executive; in the exercise of his constitutional power to prevent the passage of a law, he acts on his responsibility; but the judicial power cannot be exercised on the reasons which have governed the exercise of the veto power. We therefore forbear all remarks upon it. For a similar reason we cannot look to the construction given to the constitution by the executive department as a guide to our judgment; for no appellate or supervisory power over our proceedings, has been confided to that department. We must follow the rule prescribed by the tribunal to whom has been confided the power of expounding the constitution and laws, and of directing our judgment. That tribunal has adjudged this law to be valid, we cannot, and think you will not declare it void.

The jury found the defendant guilty

UNITED STATES V. ADAM ROUDENBUSH.

On the trial of an indictment for passing counterfeit notes, evidence may be given of the defendant passing similar counterfeit notes, in order to prove the knowledge that the note in question was counterfeit. So the passing of notes of a different bank at the same time, or of having them in his possession at the time. But if the indictment is for passing a counterfeit note of the bank of the United States, evidence of passing a counterfeit note of another bank, at another time, is not admissible, or if given without objection a jury will not consider it.

Good general character avails a defendant only in a doubtful case.

Intoxication is no defence, if the defendant was possessed of his reason, and was capable of knowing whether the note he passed was good or bad.

THIS was an indictment for passing a counterfeit ten dollar note of the Bank of the United States, on the trial of which Mr Gilpin, district attorney, without objection, had given evidence of the defendant having passed a counterfeit five dollar note of the Easton, Pennsylvania, bank, to a different person and at a different time from what was laid in the indictment. Mr Hubbell and Mr Jack, in their address, requested the court to charge the jury that the evidence was improper, and ought not to be considered by them.

Evidence was given that the defendant had sustained a good character before the charge was made against him, and at the time of the alleged offence was in a frolick and intoxicated.

BALDWIN, J. to the jury.

In cases of this description, the offence consists in the guilty knowledge of the party who passes a counterfeit note, which can seldom be made out by direct proof; the prosecutor is therefore at liberty to prove the *scienter* by circumstances happening at other times, and in relation to other notes. He may show the whole conduct of the prisoner at the time of passing the note for which he is indicted, his having in possession or passing other counterfeits of the same or a different appearance, every thing he said or did at the time, as part of the *res gesta*, indicative of his knowledge of the character of the notes he has about him, or is passing. 5 P. & P. 93; 1 Burr. 645; 1 Camp. N. P. 324; 6 B. & C. 145; R. & R. 375; 13 C. L. 125; 5 Rand. 701; 5 Day 175. Evidence of passing notes of the same manufacture and appearance, at other times, and to other persons, is also admissible, if their general resemblance to the one laid

[United States v. Roudenbush.]

in the indictment is such, that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine. So of the circumstances of passing them, and his whole demeanour at the time, 4 B. & P. 92; R. & R. 120, 531, so as to show that he believed them to be counterfeits and passed them as such. 3 Mass. 82; 8 Mass. 110; 2 Cow. 522. But where the notes are so different in their appearance, that the knowledge of the one being a counterfeit, would not be a reasonable ground to believe that the other was so, the evidence is not admissible, unless there is some connection between the act of passing them both. In this case the transactions are wholly distinct, being at different times and places, and there is no legal ground of presumption that the prisoner knew the note in question to be forged, because he had passed the notes of another bank knowing them to have been so. To justify the admission of such evidence of a distinct passing, the notes must be of the same or a similar manufacture and appearance, Carr. C. L. 195, calculated to lead to the belief that they were of the same character. A man who passes one counterfeit at one time, and a similar one at another, may well be presumed to have known them both to be so; but not so when the notes are on different banks, or so unlike in appearance, that an honest man might think one good, though the other was known to be bad. The *scienter* must be brought home to the note laid in the indictment, the *scienter* as to any other note, however clearly proved, is only a matter of inference, and therefore it ought to appear from an inspection of both notes, that they are so similar that a person in the situation of the defendant could not well be deceived.

The evidence was therefore inadmissible, if it had been objected to, and as it was not legally competent for you to hear, ought not to be taken into consideration in making up your opinion on the fact, whether the defendant knew the note laid in the indictment to be counterfeit. This is the principal question in the cause, as the mere fact of passing a counterfeit note is no offence without a guilty knowledge that the note in the indictment was forged. The evidence of his passing other counterfeit notes is not admitted to prove a distinct offence, but merely corroborative of the crime charged, and as auxiliary proof, if the evidence as to the note in the indictment is doubtful.

But while this is an exception from the ordinary rules of evidence in criminal cases, unfavourable to the accused, there is another which

[United States v. Roudenbush.]

operates in his favour. He is allowed to give evidence of his general good character, and to avail himself of it to rebut the presumption of a corrupt and criminal intention in passing the paper. It is one of the great safeguards of innocence, and never fails to have a powerful influence with the jury ; where there is any doubt, good character will outweigh ordinary presumptions and circumstances merely suspicious. But if the evidence is clear and convincing that the note was passed knowing it to be counterfeit, then, however bright his character may have been previous to the offence, *a jury must look only* to the facts and law of the case ; on the same principle, evidence is permitted to be given of the character of his relatives and connections in society, and of the situation of his family ; but these are circumstances which can avail him in a less degree only in cases of doubt ; if the positive or circumstantial evidence of guilt leaves no doubt on their minds, a jury could not suffer such considerations to operate without violating a duty which should be ever held sacred in courts of justice, to judge alike, and by the same rules, the high and low, the rich and poor.

A defendant's standing in society gives him a right to demand from you the most favourable construction of the acts proved upon him, which the law permits to be drawn ; but every dictate of public justice, the peace, interest and safety of the community, forbid him to expect, or the jury to grant him a dispensation, if his case comes within the law. If the provisions of the law have been violated, its penalties must be enforced, the arm of public justice must not be arrested in court, merely because its blow may, in reaching a guilty man, strike deep into his social and domestic relations. If there is a punishment which operates severely on the criminal, which is a solemn warning example to others, and produces an impressive influence on society, it is when the effects of crime are visited upon the dearest objects of affection ; and if any thing can prevent their commission, if society can have any hold on those who are inclined to disturb its repose, it is in the certainty that the happiness of all around them depends on their conduct. When this hold is loosened, the time cannot be far distant when the feelings of families and friends of an accused, will be deemed more sacred than the laws of the country, and his good character carrying with it an exemption from punishment, become an indemnity for crime.

One of the restraints society has upon men to prevent the commission of crimes, is the consideration they may have for their wives and

[United States v. Roudenbush.]

children; but if these connections are to be a *protection* for the guilty, so far from being a *restraint*, they will be an *inducement* to crime, they will offend, trusting to their family for escape.

If a jury make up a verdict on considerations of character, family connections or wealth, and on this ground acquit where the evidence of guilt is clear, they not only establish a principle of the most atrocious kind, but hold out a most dangerous example to society.

The danger and loss to the public from the passing of counterfeit paper, is greater or less according to the character of the person who passes it; you see this exemplified in the case before you, Shive and defendant.

If both are equally guilty, who deserves the severest punishment? he who descends from his high character, abuses his means of usefulness, perverts them to the injury of his fellow citizens, and sets a base example to all below him; who sins against light and knowledge and prostitutes every thing to his criminal pursuits, or the poor, the friendless, the low born, low connected, and of low associations, who sees his respectable neighbour commit crime with impunity, and is seduced by his example of detected, but successful crime?

The rule of law is in a few words this. Never convict rich or poor, high or low, the good or the bad, without such proof of guilt as satisfies your minds beyond all reasonable doubt.

If the character of the accused is bad, and his habits vicious, if the moral principle is impaired or extinct, and the evidence leaves you in doubt as to the motive with which the act is done, you may, and in most instances will presume, that the intention with which the particular act is done, is in accordance with the general tenor of his character and conduct.

So if the character is good, you will apply the rule in his favour; but when the evidence is clear, either way, character is out of the question; you cannot convict without, or acquit in face of the evidence.

There is another circumstance in this case which calls for some remarks from the court.

It is alleged that the defendant was on a frolick, and intoxicated at the time of receiving the counterfeit notes at Shive's. Intoxication is no excuse for crime, when the offence consists merely in doing a criminal act, without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that

[United States v. Roudenbush.]

there was a want of criminal intention ; that the reasoning faculty, the power of discrimination between right and wrong was lost in the excitement of the occasion. But if the mind still acts, if its reasoning and discriminating faculty remains, a state of partial intoxication affords no ground of a favourable presumption in favour of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same acts when sober. The simple question is, Did he know what he was about ? The law depends on the answer to this question.

The offence charged against Mr Roudenbush is not for dishonestly receiving, but for dishonestly passing counterfeit notes. If he received these notes believing them to be genuine, you must be satisfied that he passed them as true, knowing them to be false. But if he received them as counterfeits, then the act of passing them as true completes the offence without further evidence.

If you shall believe that when he received these notes at Shive's, he was in such a state of intoxication, as not to know what he was giving or what he was receiving in exchange, then you may say that he did not receive them as known counterfeits ; and before you can find him guilty will require, besides proof of his passing them as true, proof of his knowledge that they were false. This would be going to the utmost extent which the law would warrant or reason justify, by putting him on the footing of a sober man who innocently should receive forged paper.

The defendant's counsel could not ask you to go further in any case of the highest degree of intoxication. You will decide whether, from the circumstances of this case, you will feel justified in going so far.

Should you be of opinion that either from intoxication, ignorance, or the imposition practised on him by artful villany, he received the notes as good, or not knowing them to be bad, and thus make every possible allowance in favour of the accused ; you cannot extend that allowance to the passing of the notes, when intoxication has ceased, and imposition could no longer be practised upon his ignorance, if he then knew them to be forged.

UNITED STATES V. DOEBLER.

On an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity, and the delivery of one note; parol evidence of the contents of a letter to an accomplice from the defendant on the subject of counterfeit notes, for which the accomplice could not account and had not searched, but believed he has lost, is admissible. If the letter to which it is an answer is in the hands of the defendant, it need not be produced or notice given to the defendant to produce it, before evidence is given of the contents of the answer.

The law presumes that an accomplice would destroy a letter which would implicate him, and no search is necessary in order to admit secondary evidence.

In forgery no notice is necessary to produce a paper in the hands of the defendant, an accomplice, or a third person who secretes it to protect the defendant, or that evidence of its contents will be offered at the trial, though such paper is not the subject of the indictment.

If the original would be evidence of the *scienter*, as to the note laid in the indictment, the law presumes notice that all competent evidence relating to it will be offered.

After evidence that a note of the description laid in the indictment had been forged and passed, evidence may be given of delivering or passing other counterfeited notes on the same bank before or after the passing the one in question.

The time which elapses between the two acts is not material as a matter of law, but of fact for the jury to draw the inference of the *scienter*, the presumption being weaker from the length of time.

THE indictment in this case contained three counts.

1. For forging, procuring to be forged and assisting to be forged, a note in imitation of a note of the Bank of the United States, for 20 dollars, signed by N. Biddle, president, and W. M'Ilvaine, cashier; the payee, the date, and place of date is unknown, which was in the possession of the defendant, and is now in the possession of some person unknown to the jury.

2. For the same offence, omitting the names of the president and cashier, which note remains in the possession of the defendant.

3. For delivering a forged note as described in the first count, knowing it to be forged, which note is in the possession of some person unknown.

The following questions of evidence arose at the trial.

On the trial it was testified by one Rallston, an accomplice, that the defendant had in his possession at the Lancaster races, two bundles of counterfeit United States 20 dollar notes, which he said he had filled up, one of which he delivered to witness to pass, saying it

[United States v. Doeblor.]

was counterfeit ; afterwards he told witness to write to him when he wanted any more. He accordingly wrote several letters requesting the defendant to send him some of the same notes, to which he received answers; he sent one of the letters by one Shive, who brought him back a letter, which he opened and read ; being asked for the letter, he said he had it not, had no place where he kept letters or papers, did not know where to look for it, or what had become of it, but believed it had been lost. Shive proved the receipt of a letter from Rallston directed to the defendant, that he delivered it to him and received an answer, which he delivered to Rallston, who read it in his presence. Mr Gilpin then offered to prove the contents of the letter, which was opposed by Mr Brashears and D. P. Brown, for the defendant, on the ground that the letter was not produced, no search made for it, no notice given that secondary evidence of its contents would be offered, or to produce the letter to which it was an answer.

After argument on both sides, the court took time to consider the question. One Empich was then examined, who proved that at the Lancaster races, at the time testified by Rallston, the defendant delivered him a 20 dollar note, stating that it was not good, and requested the witness to play it off at a faro table, which he did not do, but after some time returned it to the defendant. Mr Gilpin, after stating that this note was not the subject of any indictment, but that the evidence in relation to it was offered to prove the scienter as to the notes charged in the indictment, asked the witness to describe the 20 dollar note, as to the bank, &c. it was on, which was objected to, on the ground that this was matter collateral to the indictment, of which notice ought to have been given to the defendant, and that it was not evidence of the scienter, because the delivery of the note to Empich was subsequent to the delivery of the note which was the subject matter of the indictment, and the question was elaborately argued. On the next day, the court gave their opinion on both questions.

BALDWIN, J.

In deciding on the admission of the secondary evidence of the contents of the letter, we must, in this stage of the cause, consider the defendant and Rallston as acting in concert in relation to the passing of counterfeit notes forged by defendant, together with Shive, who was the carrier of the letters which passed between them, and who was also concerned in passing the notes, and that the ob-

[United States v. Doeblen.]

ject of the letters was to procure from the defendant forged notes for the others to pass. The possession of such letters would be strong evidence against them or either of them, Rallston had no inducements to preserve them, but strong ones to destroy them as soon as received; the presumption is, that they were so destroyed to suppress evidence of his guilt, and he testifies that he has no knowledge of where the letter is, but believes it is lost, &c. The general rule is, that the best evidence shall be offered which the nature of the case admits, and is in the power of the party to produce; secondary evidence of the contents of papers, is not admissible when by reasonable diligence the original can be produced, but the degree of diligence depends on the nature of the transaction to which the paper relates, the importance of the paper, and the circumstances of the case. 1 D. & E. 201; 9 Wheat. 484, 563, 596; 6 Pet. 124, 366, 368; 4 Bingham. 294; 13 C. L. 443. If the court are satisfied that the paper is not kept back by design, that there can be no inducement to withhold it and the paper is of such a nature that no doubt can arise as to its contents in its substantial parts, secondary evidence is admissible even without a search by the party who had once had it in possession, *Sicard v. Davis*, 6 Pet. 124, if the non production is accounted for, so that it appears not to be attainable by the party offering to prove its contents, or that a search would be useless, *United States v. Reyburn*, 6 Pet. 366, 368. There must be a well grounded suspicion that better evidence is in the power of the party than what he produces, or negligence in making the proper search, to exclude a copy or other evidence of the contents of papers; but it is difficult to lay down a precise rule applicable to all cases. Reasonable diligence necessarily depends on the features of each case as they are developed. In the present we can have no difficulty, it is not pretended that the letter was ever in the hands of any others than the accomplices of the defendant, if self-preservation would not induce them to destroy it, they certainly had no inducement to preserve it. From the object of the correspondence, there can be no difficulty in ascertaining the subject matter of the letter and its contents, sufficiently for all the purposes of justice. It is in proof that the letter to which it was an answer was put into the hands of defendant, related to counterfeit notes, and that the one in question related to the same subject, and was delivered to the witness by the defendant himself; under such circumstances, we are of opinion that no search was necessary, as every presumption is that the letter

[United States v. Doeblor.]

was destroyed, and the account given by Ralston consistent with his situation and the subject of the letter.

It is next contended that the letter to which it was an answer, ought to have been produced, and notice given to the defendant that evidence of the contents of the letter received from defendant would be offered, before the secondary evidence can be given. It is admitted that if the letter was the immediate subject of the indictment, no notice would be necessary, but that it is necessary in all other cases, according to the rule laid down by the supreme court of this state, in the Commonwealth v. Massinger, 1 Binney 275.

Neither the cases referred to by the court in that case, or those cited in the argument, support the distinction contended for, or establish the rule laid down by the chief justice; they establish the principle that other evidence may be given as to papers which a defendant will not produce on notice to himself, Rex v. Le Merchant, 2 Durnf. & East 201; Rex v. Watson, M'Nally 354, or to his attorney. Cotes v. Winter, 3 Durnf. & East 306. Where it is in the hands of a third person, who will not produce it on a subpoena *duces tecum*, Rex v. Aickles, Leach 272, 330, or has been secreted by a brother of the defendant and another person to screen him, Commonwealth v. Snell, 8 Mass. 82, no notice is necessary. These were cases of forgery. In cases of treason by writing traitorous letters, copies from a book, which defendant said contained copies of his letters to his correspondents were received without notice, or the production of the original. Francias's Case, 6 St. Tr. 98. In Layer's Case a witness was permitted to state the contents of a traitorous paper, which defendant gave to witness to read, and which he read, without notice to produce the original. 6 St. Tr. 263, 267, 318, 319. The secondary evidence was in all these cases admitted on the ground of the paper being in the possession of the defendant or third persons, which accounted for their non production, and showed that there has been no default in the prosecutor, where the paper had been secreted to protect the prisoner, or is in his own possession. In such cases, the admission of the secondary evidence depends on tracing the original paper to the hands of the defendant, or third person, from whom it cannot be procured, and not on the question of notice. This is the rule laid down in King v. Layer, 9 St. Tr. 319, and adopted in Le Merchant's Case, 2 Durnf. & E. 203; in Snell's Case, 8 Mass. 82; and in the United States v. Reyburn, 6 Pet. 366, 368. The evidence goes to the jury, who will decide whether the paper has been so traced,

[United States v. Doeblor.]

it is a legal foundation for a verdict against the defendant, as if the original had been produced, and it is not restricted to papers which are the immediate subject of the indictment.

The King v. Gordon was an indictment for killing Mr Thomas in a duel. Gordon had sent a challenge by his servant to Thomas, who sent his answer by his servant, who delivered it to the servant of Gordon; but it did not appear that Gordon had received it. An attested copy was admitted as legal evidence, and it was left to the jury to decide, whether the original ever reached the prisoner's hands. The acceptance of the challenge was not the offence charged in the indictment, it was only a link in the chain of evidence, the court deemed the delivery to the servant such prima facie evidence of a delivery to the master, as to leave it to the jury, without notice being given to the prisoner to produce it, or that a copy would be offered in evidence.

So in the United States v. Mitchell, which was an indictment for treason in levying war against the United States, the overt act was that the prisoner was in arms with a party at Couch's fort, assisted in burning the inspector's house, and was active at the meeting at Braddock's Fields; but the indictment made no reference to the writing or circulation of any treasonable paper. The district attorney offered in evidence the copy of a circular letter, written by some of the leaders of the insurrection, calling for an assemblage of the people at Braddock's Fields, and to prove that the letter had been seen by the defendant, with whom it had been left to pass on to another person, and that the copy produced was in substance conformable to the original. This court held that if the copy offered, was a copy of one of those letters circulated at the time of the insurrection, it was admissible evidence, otherwise not; 2 Dall. 348, 357; the same principle had been settled in the King v. Hardy, et al. on an indictment for treason. 1 E. P. C. 99.

The rule laid down in 1 Binn. 275, as to cases of larceny, and in 2 Serg. & Rawle 31 and 496, in civil actions, is undoubtedly correct, the reason is obvious; in larceny the prosecutor is not allowed to give evidence of the stealing of any other articles than those laid in the indictment; the felonious intention in taking the articles in question, cannot be made out by proof of the prisoner taking similar articles at another time, or from another person, and no scienter is necessary to make out, or constitute the criminal offence. In trover and the other actions, the plaintiff must prove property in the specific

[United States v. Doeblen.]

thing claimed ; the thing stolen, or the thing taken or detained, are therefore the only matters in relation to which any evidence can be received.

But indictments for treason and forgery are not governed by the same rules, an overt act of treason must be laid and proved as laid, but as a traitorous intention is a necessary ingredient in the crime, that intent, as applicable to the particular overt act, may be made out by evidence of other treasonable acts than the one charged in the indictment, not to convict on such proof of other treasons, but to bring home the guilty intention to the overt act ; 6 St. Tr. 318, 319 ; Foster 11, 9, 10, 22, 245, 246 ; 2 Burr's Trial 428 ; the overt act charged being the only act of treason which can produce conviction, and the only point in issue between the parties, 4 Cranch, App. 493.

The constitution and law of the United States require that the overt act should be established by two witnesses, not by the establishment of other facts, from which the jury might reason to this fact ; after this fact is established, other facts may be admitted in the character of corroborative or confirmatory testimony. 4 Cranch 506 ; App. S. P., 1 E. P. C. 116. The same principle applies to forgery, and for the same reason ; as the intention and knowledge with which the act is done, constitute the crime, it may be made out by evidence of other acts of a similar kind with that charged in the indictment. This being the well settled and well known rule in such cases, the prisoner cannot be taken by surprise ; when such evidence is offered, he must come prepared to meet not only the evidence which applies directly to the specific act charged, but all other acts which, according to the known rules of evidence, a prosecutor may adduce to prove the act charged. If the note he is charged with forging, passing or delivering, is of the same kind or character with others which he has disposed of, or retains in his possession, he has notice in effect that if practicable to procure it evidence will be given of their counterfeit character, and of his having passed them as true. 4 B. & P. 94. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in fact. Notice in fact is notice in form, notice in law is notice in effect, and either are sufficient ; Yeates, J., 2 Serg. & Rawle 34 ; with the notes in his pocket, he cannot complain that he is ignorant of their character ; if he has put them off he knows to whom, and can trace them as easily as the prosecutor ; if he has retained a part, he can the better compare them, and thus avoid the imposition to his charge of notes for which

[United States v. Doeblor.]

he is not accountable. Knowing that proof of all these facts, is as competent to the prosecutor as the one specifically charged, no injustice is done him; all the acts which can be brought against him are his own, or the acts of others acting by his consent, knowledge, or procurement, and no acts of mere third persons can be testified against him. He ought to answer for, and be prepared to meet them, on the same rules of evidence which apply to the principal act for which he is on trial. The indictment is notice of that, and we think it also notice of the other acts, which are as admissible in evidence as the one charged. The reason given by the chief justice in the case of Massinger applies with great force to a case of larceny.

The defendant has no reason to believe, that the felonious taking of any other paper than the one laid in the indictment, would be brought into question; but the reason ceases in a trial for forgery, and the rule not only ceases with its reason, but a different rule arises from the most obvious reasons. The law, the knowledge of the defendant, and his counsel, all inform him, that the passing of other similar notes will be brought into question, and this is legal notice not only to this extent, but as to any letters or other papers in the hands of himself, his confederates or others, which would be legal evidence if the originals were produced. That this letter would be evidence on this indictment cannot be doubted, the only question about the admission of the secondary evidence of its contents is, whether the prosecutor has made out such a case as makes the evidence offered a substitute for the original.

The cases of Aickles, Gordon, Snell, Mitchell and Reyburn, are all of papers not in the possession of the prisoner; but it was held in all, that the paper being in the hands of third persons, by delivery by himself, his servant, or secreted by his friends to protect him; circulated among the parties to a treasonable insurrection, or delivered to an accomplice in a kindred crime, might be proved by secondary evidence, on the same principle as where it was in the possession of the party himself. We cannot distinguish the principle of this case from those, the letters written and notes passed or delivered to others by the defendant, are in the custody of some one by his consent, or destroyed, and their possession is so for his possession and custody, that the secondary evidence of their existence, character or contents, may be given under the same rules, which apply to papers in his actual custody or possession. This rule has been applied to cases, where the forged paper is set out specifically in the indictment, it

[United States v. Doehler.]

would apply *a fortiori*, where it is set out generally, as in this case. If the paper is so described as to make it appear that it is the kind and description of paper embraced in the law, evidence may be given relative to any papers coming within that description, if the indictment lays them as destroyed by the prisoner, to be in his possession, or that they cannot be produced, and there has been no laches in the prosecutor, 8 Mass. 59, 110. Whether it is properly laid in this case is a question not now before us, but if it is, then this note, if identified, may be as much the subject of the indictment as the one delivered to Rallston, though it may not be a case in which the court will compel an election to be made, as to which note the prosecutor shall proceed against. Vide E. C. L. 934. Should it be considered as a note laid in the indictment, the objection to the evidence now offered would not apply; because if the witness answers that it was a note of the Bank of the United States, it would be evidence without any notice, as it was retraced back from Empick to the defendant, and corresponded with the one charged in the indictment, or it would be evidence to show the *scienter*; so that in any view the question is proper without any notice. In the King v. Millard evidence was given of the passing of other forged notes than those laid in the indictment, though not produced at the trial, but having been traced to the prisoner, no evidence was given of any notice, nor any objection made for the want of it. Russel & Ryan 245, 247.

The indictment, in all cases of forgery, is in itself notice that all competent evidence will be produced, the defendant cannot, therefore, be taken by surprise, when the passing of any other forged notes of a manufacture similar to the one laid in the indictment is offered; whether the mode of proof is by the production of letters, copies, or proof of their contents, or by the notes, is immaterial, so that the evidence conduces to prove the *scienter* as to the one charged.

It is objected that the evidence of passing other notes in this case is inadmissible, because it was after the delivery or passing the one laid in the indictment. It seems both were passed at the time of the Lancaster races, but it is not proved whether the one delivered to Rallston was previous to the one delivered to Empick, nor is it material if there was an interval, or how long, so that there is any fair ground for presuming the two acts of uttering, to have been so connected as to show a *scienter* in the one charged in the indictment; R. & R. 135, 147; nor whether the other notes are of the same manufacture, Carr. Crim. L. 195. The whole conduct of the prisoner

[United States v. Doeblor.]

is evidence of his knowledge of the forgery ; the jury may judge from his conduct on one occasion, of his knowledge on another ; where crimes intermix, the court must go through the whole detail ; the more detached they are in point of time, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the influence of knowledge from such particular transaction ; it would not make the inference inadmissible, “as if a man should come to Manchester with a bundle of forged notes, his whole demeanour would afford pregnant evidences of the mind and purpose with which he came.” *Rex v. Wylie*, 4 B. & P. 94 ; S. P., 1 Camp. 400 ; 6 St. Tr. 58.

For these reasons we are of opinion that evidence of the contents of the letter received by Rallston from the defendant, and of the description of the note delived by him to Empich is admissible ; it will be for the jury to judge of the knowledge of the note laid in the indictment to be a forgery, from the whole conduct and demeanour of the defendant, whether by acts or writing. Whether the other transactions justify them in drawing the inference, is for them to decide ; the distance in point of time between the delivery of the note at the Lancaster races, and the writing the letter to Rallson from Lebanon, may weaken the presumption ; but connected as they are by evidence, the jury may look to the whole conduct of the defendant in relation to the delivery or passing of counterfeit notes of a character and manufacture similar to those laid in the indictment.

The jury found the defendant not guilty.

MERRILL AND FOSTER v. RINKER.

A receives goods from B and C, on an agreement that A should take them for sale from place to place, to pay the invoice price for such as were sold, to return those unsold and be credited with the amount at the prices charged, A to receive the surplus of what was sold over the invoice price. Held : that such agreement is not fraudulent in law, if not so in fact.

The goods were put up in New York, and brought to this state for sale, where they were attached by the creditors of A, for debts due before the agreement. A returns to New York, returns the invoices and abandons the goods to B and C, who rescinded the contract. Held :

That A was a competent witness in an action for taking the goods.

That B and C could recover in trover for taking them, if the contract was not fraudulent.

A and M, were partners when the goods were invoiced, before the contract, M sold his interest in the partnership effects to B, held that A and B could sustain the action.

Reputed ownership in A, under such a contract, does not justify a creditor of A in taking the goods, unless under the statutes of bankruptcy.

Possession of goods by any other than the real owner, is neither fraudulent or a badge of fraud, if the want of possession is fairly accounted for, and there is no fraud in fact.

THIS was an action of trover, brought against the sheriff of Lehigh county, under the following circumstances :

Thomas W. Viles was an insolvent debtor, who had been discharged under the insolvent law of New York in 1828. Merrill & Minikin were merchants in New York, to whom Viles applied for goods to trade on, which they agreed to furnish him on these terms ; an invoice of the goods delivered was to be made out, Viles to sell them at the invoice price, and not less, he was to receive the overplus for his trouble, to return what he did not sell and be credited for them, and to pay the invoice price for what he sold. Under this agreement goods were laid off, and were packing, from the 25th February till the 5th March 1830, amounting by the invoice to 1328 dollars, and delivered to a wagoner employed by Viles, who took them to Easton in this state, where they were attached by his New York creditors, Viles immediately returned to New York, delivered back the invoice to Merrill, and abandoned the concern ; Merrill accepted the invoice, and rescinded the contract ; the goods were afterwards taken to Al-

[Merrill & Foster v. Rinker.]

lentown, where they were sold by the defendant, on process by the creditors of Viles, who indemnified him.

On the 5th of March 1830, Minikin sold out his interest in the firm of Merrill & Minikin, to Foster, one of the plaintiffs. Merrill & Foster were the only partners in the firm, the business was carried on in the name of E. Merrill, agent.

Viles received the invoice on the 6th of March, made out in the name of Minikin & Co., dated 25th of February, Merrill struck out this date and inserted 6th of March, he also struck out Minikin & Co., and put in E. Merrill, agent; thus altered it was delivered to Viles.

The invoice was copied from the books of the plaintiffs, where it was entered, the invoice in the book and copy was headed, "merchandise, consigned to J. W. Viles by Merrill & Co.," and altered as above.

Minikin & Co. had previously had similar transactions with Viles, who settled for them on the terms above stated, and was credited with the goods returned unsold. The plaintiffs' agent demanded the goods from the defendant before sale, who refused to deliver them, saying he was indemnified. The debts of Viles, for which the goods were sold, were due before his discharge.

At the trial, Viles was offered as a witness by the plaintiffs, to which Mr Wharton and Sergeant objected on the ground of interest, inasmuch as he is liable to the plaintiffs for the value of the goods, an agent may be admitted from the necessity of the case, but here there is no agency.

BY THE COURT. The jury must decide whether Viles is an agent, factor, or purchaser of the goods, as between plaintiffs and defendant. But as the plaintiff has rescinded the contract, and accepted a re-delivery of the invoice, with an abandonment of the goods by Viles, he cannot consider Viles as a purchaser, nor can he look to him for the goods as his agent, where they have been taken from him by process which he could not resist; so that he has no interest in the suit. The bringing the suit, is an affirmance of Viles's being a consignee, in which capacity he is answerable only for negligence, or a violation of the terms of the consignment, neither of which is in evidence. 2 H. Bl. 590, 591. The objection was overruled, but the plaintiffs did not call the witness till they produced a release to him from plaintiffs.

[Merrill & Foster v. Rinker.]

Mr T. Bradford and J. R. Ingersoll, for plaintiffs.

The transaction was a fair and real one, made bona fide, without any intention to give Viles a false credit, or injure his creditors, the effect of which was to make Viles the special agent, factor or consignee, with power to sell at prices limited, and with a right to return the goods unsold to the plaintiff. He was not a purchaser of any goods remaining unsold, nor was he a debtor to the plaintiffs except for what he did sell; the seizure by the sheriff prevented a sale or re-delivery according to the terms of the consignment, so that the property of the goods remained in the plaintiffs. It was competent to them and Viles to rescind the agreement, by which the rescission related to the delivery of the goods. *Salte v. Field*, 5 D. 211, 213.

Viles having no interest in the goods, unless they sold for more than the invoice price, was not a partner of the plaintiffs, his only claim was in the nature of a commission, or compensation for his services in selling: he had no interest till a sale. *Miller v. Bartlett*, 15 Serg. & Rawle 137; there was therefore nothing to be taken on an attachment against the property of Viles. No property passed by the delivery, till the contract was consummated by complying with the conditions, though it had not been rescinded or a partial payment refunded. *Morstow v. Baldwin*, 17 Mass. 606, 610. If the interest in the profits is merely in payment of services, it makes no partnership; *Day v. Boswell*, 1 Camp. 330, 331; S. P., *Wish v. Small* 331, cited; so if a broker is employed to sell and is to receive all that the article sells for beyond a certain sum fixed by the plaintiff, *Benjamin v. Porteous*, 2 H. Bl. 590, 591; S. P. 15 Serg. & Rawle 119.

Viles could not have sold these goods to pay his old debts, neither could he have pawned them; such acts by a factor would not charge the property, so as to divest the right of plaintiffs, *Martigny v. Coles*, 1 M. & S. 140. The assignment by Minikin to Foster of his stock in the firm, gave the latter a joint interest in the goods, so as to authorize this suit in the names of Merrill & Foster.

They had a right of stoppage in transitu, Viles was their bailee, whose possession was theirs, which is sufficient to maintain trover against any one who takes them out of his hands, *Thorp v. Berlin*, 11 J. R. 285; 1 M. & S. 140; 16 J. R. 74; J. R. 472, &c., there was a conversion here, no demand was necessary, but if necessary a demand by an agent is sufficient. 3 East 381.

By the terms of the contract, the plaintiffs retained their right to

[Merrill & Foster v. Rinker.]

the goods, which were bailed to be sold on special conditions, limiting the price, stipulating for their return at all events if not sold; it was a special consignment in the nature of a conditional sale, by which the general property remained in the plaintiffs, subject to the right of selling at the invoice prices. Though this was not in the ordinary course of factorage transactions, yet it was so in its incidents, and the relative position and rights of the plaintiff and Viles; third persons were in no worse condition than if it had been an ordinary consignment, as the only peculiarity in it was the mode in which Viles was to account for the goods intrusted to him.

The turning question is on the good faith and fairness of the course of dealing between the parties; though the jury should find it to have been fraudulent, collusive, or a mere colour to cover an absolute sale to injure creditors or purchasers, or to give Viles a false credit, there is nothing in the transaction to make it so, as matter of law. Cases of reputed ownership merely, without any badge of fraud, arise only under the English statutes of bankruptcy. Though there was a delivery to Viles, it was conditional, so that any violation of the terms by Viles would rescind the contract from the time of delivery; the same effect would be produced if any third person should take a tortious possession of them, thus preventing Viles from selling pursuant to the condition. The plaintiff therefore had, at the time of the conversion, such property and present right of possession, as is sufficient to maintain this action. J. R. 472; 15 East 609. Here the property was unchanged, the specific goods entered in the invoice, were the same which were taken by defendant, and the right of property remained in plaintiffs. 2 Ves. Sen. 582, 585; 1 Atk. 232; 3 P. Wms 185; 2 Esp. 578, 579.

Mr T. I. Wharton and Mr Sergeant, for defendant.

1. The transaction between the plaintiffs was in substance a sale on credit, but disguised so as to give it the appearance of a consignment or agency. Viles had the uncontrolled possession, with power to sell, not as a bailee, but as the owner of the goods, it was not a case of factorage, as Viles was liable for the invoice price as soon as he sold. Where property is delivered to another to be returned specifically, it is a bailment; but if an equivalent in kind, or any other may be returned, it is a sale; Jones on Bailment, 102; Story on Bail. 193; 7 Cow. 752; 4 Cow. 752; 19 J. R. 44; 2 Kent's Comm. 464; 1 Rand. 3: the option of re-delivery or paying the value, distin-

[Merrill & Foster v. Rinker.]

guishes a loan or bailment from a sale. 2 Wh. Sel. 1052. Though the statute 21 Jac. 1, does not extend to a factor, yet if goods are in the hands of a retail dealer, to be sold or returned, they pass to his assignees as a case of reputed ownership. 2 Camp. 83; Bull's N. P. 42; 2 East 117, 125.

Where goods were sold to be paid for in thirty days, or warehouse rent to be paid, the property was absolute in vendee, though there had been no delivery, 1 Camp. 513. Here was an actual delivery and removal of the goods out of the control of the vendor, Viles was in full possession as owner, with assent of plaintiff, this is evidence of property till the plaintiffs make out the property to be in them clear of all doubt, 5 Serg. & Rawle 275. Plaintiffs could not reclaim the property or countermand the authority to sell, Viles pays all charges and expenses, and has no lien on the goods; these circumstances divest the case of every feature of one of factorage or agency, nor is it a case where the plaintiffs had any right of stoppage in transitu. The delivery was complete, Viles's power over the goods absolute, and there was no insolvency between the sale and their reaching their destination. So that the right of stoppage did not exist, Rop. on Vend. 189; Abbott 374; Holt 498; 2 Wh. Sel. 1052; 2 East 125.

2. Viles was a partner by having a right to the profits, Gow. 15, 19, third persons had a right to so consider him, 17 Ves. 404; Rosc. 89; 19 Ves. 461, and to seize the goods in his possession.

3. To support trover the plaintiff must have actual possession, or such property in the goods as gives him the right of present possession, absolute or qualified, 1 Ch. Pl. 150; 2 Wh. Sel. 1050, 1051, 1057. A landlord cannot have trover for goods leased during the term, 7 D. 9, 11; S. P., 4 Wash. 387, because he has not a present right of property, otherwise, if the lease is void, as if made to a feme covert, 15 East 607. Here the plaintiffs had neither property, possession or a present right of possession.

BALDWIN, J. to the jury.

Whether by the contract between the plaintiffs and Viles, there was a sale or a special consignment to the latter, of the goods in controversy, depends mainly on the intention of the parties. If the contract, as testified by the witnesses, and entered on the books of the plaintiffs, contains their whole agreement, as truly understood and intended by both parties, it is no sale in law or fact, on the other

[Merrill & Foster v. Rinker.]

hand, if the real object was a sale, under the cover of a formal consignment, then it was a sale and not a consignment, however it may have been entered on the books, or stated to the witnesses. This is a matter of fact for your consideration, should you find the transaction to be a consignment, you will inquire whether it was fairly and honestly made, with no other object than has been stated or shown in evidence, or is evident from its nature ; or whether it was done to enable Mr Viles to defraud his creditors, to give him a false credit, or hold him out in false colours on the credit of the goods. Should you think that the goods were delivered for either of such purposes, it was fraudulent as to creditors and third persons, whether it was a sale or consignment, and your verdict ought to be for the defendant. Should you think that the contract was made fairly and honestly, as a special consignment, to enable Viles to support himself and family, your verdict will depend on whether it is fraudulent in law, though not in fact.

Fraud in law, is the commission of an act prohibited by the words or policy of the law, or where certain acts are deemed full evidence of fraud and fraudulent in themselves, though not so intended ; cases of reputed ownership do not come within this rule, they arise only under the positive provisions of a bankrupt law, by which a person in possession at the commission of an act of bankruptcy, of goods with the consent of the true owner, is declared to be the reputed owner, and the goods pass to his assignees, in the same manner as if he was the real owner. In cases not within the statutes of bankruptcy, there must be something more than merely reputed ownership in the person in possession of goods, to affect the right of the real owner ; something inconsistent with the nature of the transaction, the dealings between the parties, or some badge or evidence of fraud, intended or tending to injure others. 9 J. R. 201.

As a general rule, the possession of personal property is evidence of ownership, but if from the nature of the case, possession is necessarily in one person, and the ownership in another, it is neither fraudulent in itself, or a badge of fraud ; a possession for a special purpose, by a person for the use, by the orders, or in the transaction of the business of another in its usual course, does not make the property liable to an execution or attachment for the debt of the holder. Such a possession is not within the principle of the statutes, or common law, for the suppression of fraud ; if the contract is fair

[Merrill & Foster v. Rinker.]

and honest, the possession consistent with its nature, terms and intention of the parties, then as the want of possession by the real owner, is fairly accounted for, his rights cannot be affected by a third person.

After an absolute sale of goods, possession by the vendor is *prima facie* evidence of fraud, which must be rebutted; if the sale is conditional, the retention of possession by the vendor, till the condition is complied with, is no evidence of fraud. Goods consigned to a factor, an agent, or delivered for a special purpose, cannot be taken from the true owner; if the conduct of the parties is consistent with their contract, and that in its terms is fair and honest, no fraud is imputable, its form is immaterial, whether it is in the shape of a consignment, a conditional sale, or partakes of the character of both, according to the true intention of the parties. Vide 9 J. R. 337, 338, and cases cited, 5 Serg. & Rawle 278.

In this case the contract was a special one, giving Viles power to sell at invoice prices, but binding him to return the goods if not sold; as between him and the plaintiffs, this did not vest the property in him by the delivery, he was their agent while the goods were in his possession, and when he sold them was their trustee for their invoiced price. Before a sale, the creditors of Viles had no more right to seize the goods, than if they had been in the warehouse of a factor or commission merchant; from the nature of the contract Viles must have the possession and control, and while he was acting pursuant to the contract in good faith, his creditors had no right to take the goods. Any reputed ownership from possession, and selling the goods as his own, would not justify their seizure for an antecedent debt; though a person who, trusting to the visible ownership, had given him a credit, might set off his debt against a claim by the plaintiffs for the goods purchased, 7 D. & E. 359, 361. As a question of law therefore our opinion is, that the agreement between Viles and the plaintiff, was not fraudulent in itself as against the law; you will decide whether it was fraudulent in fact or intention; if you negative fraud, then the contract is valid in law, either as a consignment, or a conditional sale. It has been contended that Viles was a partner, and the goods liable to seizure for his debt; but even admitting that the contract created a partnership, a creditor of an individual partner has no right to sell the partnership property; he can sell only what belongs to the debtor partner, after paying the debts due by the firm, and his own debt to the firm. An execution, an attachment, or act of bank-

[Merrill & Foster v. Rinker.]

ruptcy, may dissolve the partnership, but gives no authority to force a sale of the joint stock, before the share of the debtor partner is ascertained; what belongs to the creditors, or the solvent partners of the firm, cannot be appropriated to pay the private debt of a partner.

It is objected to the plaintiffs' right of recovery, that they have no joint interest in the goods, or possession in law or fact, sufficient to sustain an action of trover. If you are satisfied that in point of fact, Minikin had transferred his interest in the partnership effects to Foster, before the commencement of this suit, then in point of law the plaintiffs have a joint interest in the goods.

Whether the plaintiffs have such possession or right of possession as will sustain this suit, depends on your opinion on the question of fraud in fact; if you think the contract was colourable, intended as a cover for fraudulent purposes, the action must fail. But if you think the contract was in good faith, made for the purposes stated, the conduct of the parties consistent therewith, without any intention to defraud third persons; then, as no rule of law or policy is violated, the plaintiffs had the right of possession, against any person who converted the goods to his own use, while the contract was in the course of execution, according to the true intention of the parties; they have the legal possession, and may recover in trover the value of the goods, with interest from the conversion.

Verdict and judgment for the plaintiffs.

BAINBRIDGE AND Co. v. WILCOCKS.

Where bills are accepted payable in London on a promise to provide funds to meet them, the contract is governed by the law of England.

An account current received and not objected to in a reasonable time becomes a settled account, bearing interest from the time it is stated, and the balance is payable on demand.

An account made up of principal and interest becomes one principal debt when settled, the aggregate balance bearing interest.

Compound interest is not illegal, and may be recovered on an express promise, or one implied by law, as a part of the contract.

If an account contains a charge of interest during a war, it is recoverable if there is a promise to pay the account after peace, or the account is in fact or law a settled account, from which the promise results by operation of law.

THE plaintiffs were bankers and commission merchants residing in London, the defendant a merchant residing in Philadelphia ; this suit was brought to recover a balance of an account, principally for bills accepted by plaintiffs at the request of defendant, or drawn by him, on his promise to make provision for them at maturity. The money was paid before and in 1810, and charged in account; the defendant left the United States in June 1811, and did not return till 1825. On the 25th of June 1811, he wrote to the plaintiffs that he appointed William Waln of Philadelphia his agent in his commercial transactions, and desired them to take his directions, the defendant being about to go to South America and Canton.

In September 1811 the plaintiffs sent to Mr Waln their account current with the defendant, exhibiting a balance due by him of 300 pounds. In March 1813 they sent another account to him, balance 1500 pounds, in March 1815 another, balance 1660 pounds, in March 1817 another, balance 1830 pounds, which were received by Mr Waln in due time, a copy of the last account was also delivered to the defendant in Canton in the same year.

These accounts were made up of the items of charge and credit, beginning with the old balance, on which interest was charged till the making up of the new account ; a balance was then struck and carried to the new account. The three last accounts were made up of the balances of the former accounts, with interest added ; the effect of which was, that the aggregate balance of principal and

[Bainbridge & Co. v. Wilcocks.]

interest in the last account, became principal in the next, with interest computed upon it.

In the last accounts, interest was charged during the late war with England, letters from the plaintiffs to the defendant at Canton, complaining of the non payment of the balance were sent in 1817, 1819, 1823; which were received, but were not replied to till 1824, when defendant refused payment, alleging that he had paid Mr Waln, to whom the plaintiffs had charged the account on his guarantee made in 1810.

Mr Waln continued to be the agent of defendant till 1819, and appears to have kept up a regular correspondence with him, in which reference was made by both, to the accounts of the plaintiffs; there were large accounts between them and Mr Waln, and Mr Waln and the defendants, which were given in evidence at the trial, together with a great mass of correspondence. It was alleged by the defendant, that he had objected to the account in Canton when it was presented to him in the winters of 1817, 1818, but the evidence was contradictory. Much time of the trial was occupied on the allegation of payment to Mr Waln by defendant, of the balance claimed by plaintiffs, who had at one time charged it to him, but no satisfactory defence was made out on that ground; there was also some controversy as to some of the items of the account, and some additional credits claimed.

No questions of law arose at the trial except on the charge of compound interest, and interest during the late war, which were objected to by the defendant's counsel; these were the principal questions in the cause.

The trial occupied eight days, principally on matters of fact.

Mr Chauncey and Mr Binney, for plaintiffs.

Mr C. J. and Mr J. R. Ingersoll, for defendants.

BALDWIN, J. to the jury.

The account between the parties consists of advances made in London by the plaintiffs, who resided there, to the defendant residing here, and payments made on account by the latter in London. The whole course of the transactions and correspondence between them shows, that the contract was to be performed in London; the rights and obligations of the parties, the rate of interest, and the rules for its computation, must therefore be governed by the law of England;

[*Bainbridge & Co. v. Wilcock.*]

the remedies on the contract depend on the law of the forum. The relation between the parties is that of agent, factor and depository on the part of the plaintiffs, and the defendant as their principal; their obligation is to account for the effects which came to their hands, his is to reimburse them for advances made, and responsibilities incurred at his request by a letter or a bill drawn on them. The contract between them is not one implied by a loan, but a special contract of indemnity, arising from the relation between them, governed by the law and usage of merchants, which makes it the duty of a person who draws bills on another without funds, to place them in the hands of the acceptor before the bill is due. Though the acceptor becomes the principal debtor to the holder of the bill, yet he is considered as the surety of the drawer, entitled to full indemnity, if funds are not provided in time; the factor or agent who has accepted on the faith of such contract, must be put in the same situation as if it had been complied with punctually. Interest is deemed to be a compensation for not paying money when due, the law of England as to the payment of interest is well settled.

On a note payable at a particular day, with interest, it is payable from the date, 5 Ves. 803; Coop. 29; 2 Mass. 568; 3 Mass. 221, if interest is not mentioned, then it runs only after the day of payment, 2 Burr. 1081, if goods are sold payable at a certain day by a note or bill, if not given, the account bears interest, as if the note or bill had been given, for the obligation to pay is equal. 13 East 98; 3 Taunt. 157; 2 Camp. 272, 280; 17 Ves. 278. Any instrument of writing by which money is to be paid on a day certain, bears interest thereafter; not as damages, but as part of the contract. 3 B. C. 439; 3 Ves. 133, 134. The balance of an account properly stated, bears interest from the time of liquidation till the principal is paid, though the debt, from its nature, did not bear interest. 3 Ves. Sen. 365; 2 W. Bl. 761; 3 Wils. 206; 2 Atk. 211. It will be computed on all notes, bills, contracts or debts, which on their face, or the nature of the contract, carry interest, 2 Ves. 306, from the day when payable, on money lent; Dick. 307, 308; Bunb. 119; if there is no time of payment, or if payable on demand, then after demand made, 1 Ves. 63, on an overdraft on a banker, though a note is taken for it payable on demand, the interest is due from the usage and course of dealing between banker and customer, and the contract implied therefrom, 2 Ves. 302; so on an advance of money by an agent in transacting the mercantile concerns of his principal. 3 Camp. 466, 467. It will

[*Bainbridge & Co. v. Wilcocks.*]

be allowed on an account current between merchants, where one has laid out a gross sum for another, *Ridgway's Case*, T. Hard 285; 1 H. Bl. 305. So on an award to pay the sum due on a balance of accounts on a certain day, 3 Camp. 467; or on award of damages assessed pursuant to a statute, 1 M. & S. 173, 174; on an account stated by a master in chancery, 1 P. Wms 480, 653; 1 Atk. 244. These are the rules which prevail at law, as well as in equity, except in cases of bankruptcy; in such cases as the commissioners cannot award damages, the interest is allowed only in cases where it is due by contract, not where it is given by way of damages merely, 1 Atk. 75, 80, 151, 244; 3 B. C. 436, 439, 504, 508; 2 Ves. 295; Rosc. 317, 400. Where the course of trade between two countries has been settled to allow interest in certain cases, it is evidence of a contract to pay it according to such usage, Doug. 361, as the tacit law of the contract presumed to be agreed on by the parties, 3 Caines 234, 243.

Though an account does not bear interest *a priori*, yet the party receiving the account with interest charged according to usage or custom, it is evidence of an original agreement to pay it; so if the parties have settled an account according to such usage. 3 B. C. 439, 508; 3 Wash. 352, 402. In all such cases, the interest accruing from the time when an account is liquidated by the parties, when it is settled or liquidated by presumption of law from the conduct of the parties, or their implied agreement, by an award, a report of auditors or a master, an inquest or a jury, becomes as much a part of the debt due by the contract, as the original sum out of which it arose. 3 Burr 1088.

To make an account a stated, settled, or liquidated one, it need not be signed by the parties, it is enough that it shows a balance, or that there is none. 2 Atk. 251, 399. If one merchant sends an account to another in a foreign country, and he keeps it by him any length of time, as two years, without objection, the rule of courts and merchants is, that it is understood as a stated account, 2 Ves. Sen. 239; 2 Atk. 251; S. P., 15 J. R. 409, 424, where the parties live in England, it has been held that not objecting to the account by the second or third post is an allowance of it. 2 Vern. 276; S. P., 1 P. Wms 653.

The time within which an account shall be taken as a stated one, unless objected to, cannot be definitely fixed, it depends on the circumstances of the case, whether an acquiescence or a presumed agreement to the correctness of the account exists. If it does, and

[Bainbridge & Co. v. Wilcocks.]

the party does not account for his silence, the account is considered as settled to his satisfaction, and the party claiming the balance is not bound to prove the items of his account.

The party charged may show errors and omissions apparent in the account, but the burthen of showing them is on him who receives and keeps the account without objection, and the errors must be specified; they will not be corrected on doubtful or only probable testimony, but must be palpable, and not to be misunderstood, the party complaining can only surcharge and falsify, but cannot open the account generally, unless there has been fraud practised upon him; 2 Atk. 119; 9 Ves. 266; 1 Ch. Cas. 299; 1 Vern. 180; 2 B. C. 62; it is the law of this country; 7 Cranch 151; and a settled account is not opened, by being introduced into a second one, 4 Cranch 309.

These rules apply to all stated or settled accounts which bear interest from the time of settlement, unless some time for payment is stated, although part of the balance is for interest.

Where regular accounts are settled from time to time, interest on interest is allowed. 3 B. C. 440.

Where an account of moneys paid for insurances, and on other transactions between agent and principal, had been rendered annually, and interest charged at the close of every year on the balance, and the interest of each preceding year added to the principal, and no objection was made when the accounts had been rendered, until the expiration of ten years from the first account, the interest so charged was allowed, 3 Camp. 466, 467.

Where bankers furnish an annual account without objection, an agreement *shall be presumed* that the balance of principal and interest shall bear interest, 1 B. & B. 428.

Accounts between merchants may be settled every half year, on the principle of compound interest, 9 Ves. 223, 224.

It may be allowed where there is a contract implied, or it is the usage of trade, 2 Ves. 16, 17, 20, 21 (vide a very able opinion of the late Judge T. Smith, 4 Yeates 224), or accounts transmitted annually, 2 Ves. Jun. 20, semb. It is not illegal, 1 Ves. 99; compound interest cannot be a priori, but is just after the debt is due, 9 Ves. 224.

When it is the custom of a place and the practice of the parties, to strike a balance every quarter, and render the account, it brings it to the case of a fresh agreement, at the beginning of every quarter, to lend the sum then due, which is not illegal, 2 Anst. 496. *Acqui-*

[Bainbridge & Co. v. Wilcocks.]

escence in an account rendered, is not, per se, an agreement to it, but it is evidence from which it may be inferred, that the party who receives the account, without objection, thereby agrees] to continue this course of dealing, and to retain the balance in his hands rather than to pay it. It is a tacit assent to the terms demanded by the creditor on the face of the account rendered, which is direct notice of his understanding of their agreement ; if the debtor is not content, he is bound by every principle of good faith to give notice of his dissent. The balance due is the capital of the creditor, which he leaves in the debtor's hands on paying interest ; if it is not recoverable, his capital consists in a dry, barren balance, while his debtor uses it to a profit. The law does not impose such hardship on an ordinary merchant who makes a profit by his dealing, still less on a factor who receives only commissions and interest on his advances ; especially in a case like the present. No contract can be more obligatory in justice or mercantile faith, than one by letter promising to provide funds to meet an acceptance by a friend and agent ; or an implied one more sacred, than what the law infers from drawing a bill without funds, and its acceptance for the accommodation of the drawer. Nor can there be a case where there can be less ground of complaint, than one where, after such a contract has been violated, the creditor strikes a balance of principal and interest only once in two years, as in the one before you ; and if the law will presume an agreement from silence in any cases, it is in this, where accounts had been rendered at intervals of two years without an objection, till the expiration of thirteen years from striking the first balance.

It has been objected that the defendant was in Canton when the accounts were rendered. But it is a conclusive answer to this objection, that Mr Waln was his agent, so notified to the plaintiffs, who were directed to correspond with him as such ; the accounts were received by Mr Waln, between whom and the defendant a constant correspondence was kept up. Notice to the agent was notice to the principal, it was the agent's duty to communicate the accounts, and from the evidence there can be no doubt of the fact that they were so communicated and received, but if they were not received in fact by the defendant the law will presume it in this case.

We instruct you therefore, as matter of law, that the accounts which have been rendered by the plaintiffs, and received by Mr Waln or the defendant, are to be considered as stated or settled accounts, and as liquidated by the parties ; as fully so as if they had been

[*Bainbridge & Co. v. Wilcock.*]

signed by both. The balance struck is a debt bearing interest, as a matter of contract implied by the law, and the balance is considered as one debt, without regard to the items which compose it; the aggregate of principal and interest, due on the old account, is carried to the new, imparting a promise to pay on demand, with interest from its date.

A promise or agreement implied by law, is as binding as if made by the party, the legal presumption is in the place of proof by witnesses; if the evidence is in writing, or the facts are admitted, the law declares what is the contract which results from them; so if a jury find the facts specially, the legal conclusion is a matter of law. If the facts are contested and the evidence doubtful, the jury will decide whether there was a promise express or implied to pay interest; but if they are satisfied that there was such promise in fact, or that such facts existed as are the foundation for the legal presumption of a promise or agreement to pay it; then interest follows as a matter of law. But though not so satisfied that there was an express or implied contract for the payment of interest, the jury may find it as damages for the non payment of the principal.

In this case there is no fact in controversy which can affect the question of interest, the account being a settled one, the law raises the promise to pay interest on the balance stated in the last account rendered, as a matter of contract, which you will find accordingly. This implied agreement, applies as well to the interest on the account during the late war, as to what accrued before or after; the promise which the law raises to pay the whole account, carries with it the war interest, though it may not have been recoverable had it been objected to in time, there is no law which makes such promise illegal, or which can prevent the plaintiff from recovering it on an express or implied promise after peace. Our opinion therefore is, that in point of law the plaintiffs are entitled to interest as stated in their account.

The jury found for the plaintiffs with only simple interest, and as no motion was made for a new trial, judgment was rendered on the verdict. Vide *York and Sheepshanks v. Wistar*, *post*.

BARR AND AUCHINCLOSS V. SIMPSON.

This court has jurisdiction of an action of debt on a judgment obtained in a state court by a citizen of another state.

THE declaration in this case, was on a judgment obtained by the plaintiff against the defendant, in the district court for the city and county of Philadelphia, to which there was a general demurrer and joinder in the demurrer.

The only question raised was, whether this court had jurisdiction of the case.

It was contended on the part of the defendant, that if there was a concurrent jurisdiction in both courts over the original cause of action, the plaintiff was bound by having elected to sue in the state court, and could not proceed to enforce payment in any other, otherwise he could proceed by execution from both courts.

BY THE COURT.—The subject matter of the suit in the state court, was a note which by the judgment became merged in the higher security. In this court, the subject of the suit was a judgment, which was conclusive evidence of a debt due the plaintiffs, who being citizens of New York, have a right to sue in this court, on any cause of action within its cognizance. We cannot discriminate between a debt due by judgment, or in any other way, an action of debt on a judgment is not like a scire facias, which must issue from the same court which rendered the judgment.

The demurrer is therefore overruled and judgment rendered for the plaintiffs.

BAINS V. THE SCHOONER JAMES AND CATHERINE.

An account for provisions furnished to the owner or commander of a vessel, or for articles for her use when not on a voyage or in a foreign port, is not within the admiralty jurisdiction of the district court, either as a substantive distinct claim or as an off-set to a libel for seamen's wages.

Admiralty jurisdiction is referred to in the constitution as it was restrained by the statutes and common law in England before the revolution, and as it was exercised by the state courts before the adoption of the constitution.

The rules which regulated it and the cases where it can be exercised, considered libels for seamen's wages, as held in England not to be within the statutes which restrain the jurisdiction of the admiralty, either as being excepted cases or as coming within the rule of *communis error facit jus*.

Contracts of seamen for maritime service are in effect maritime contracts, governed by the maritime law, which prescribes the rights and obligations of the parties differently from the common law.

In the United States they are regulated by the act of 1790, which gives seamen a right to proceed in the admiralty for the recovery of their wages.

The seventh amendment to the constitution excludes the jurisdiction of admiralty over contracts regulated by the common law; suits upon such contracts are appropriately "suits at common law" within the terms of the amendment, and are cognizable only in courts of common law.

No off-set is allowable on a libel for seamen's wages, unless a payment on account thereof.

No account against the vessel is chargeable to the master, unless it is presented in a reasonable time, so that the master may charge it to the owners before settling with them.

THE case was a libel in the admiralty for seamen's wages, to which the claimant offered to set off an account against the libellant, composed in part of provisions furnished him for the use of vessels which he had commanded, and a pump for one of them.

Mr Hubbell opposed the allowance of the credit. 1. Because the account offered was not cognizable in the admiralty, it being merely for goods and provisions sold, and not on a contract in its nature maritime, or made at sea. *Le Coux v. Eden*, Doug. 594; 3 Bl. Comm. 106; 3 Mason 161; 4 Wheat. 438.

2. The claimant can make no off-set against a claim for seamen's wages, otherwise than by showing advances made on account, or some matter which would tend to affect or diminish the amount of compensation due. 3 Mason 171.

[*Bains v. The Schooner James and Catherine.*]

Mr J. M. Scott, for the claimant.

The libellant might sue at common law, and by changing the forum, cannot put the other party in a worse situation than he would be at law. But though he sues in the admiralty, it is a court of equity, and will not permit a recovery against equity and good conscience, though the case may not come within any statute of set-off. 2 Burr. 826; 2 Gall. 526, 551. A court of law will set off one judgment against another, 4 D. & E. 123. An obligor may set off against the assignee a debt due him by the obligee. 1 Rawle 227, 291; and courts of admiralty have the same power of allowing set-off, as the courts of Pennsylvania.

The debt claimed to be set off is of admiralty jurisdiction, it being founded on a maritime contract for provisioning and repairing vessels; 2 Gall. 475; 4 Wash. 454; 4 Wheat. 438; 1 Wheat. 96; 2 Gall. 345; 1 Pet. Ad. 226, 233; and though the contract was made on land, it is incident to matters arising at sea. 2 Ad. 309.

BALDWIN, J.

The object of the libel was to obtain the payment of the balance of wages due the libellant as mate of the schooner James and Catherine, by shipping articles on a voyage from Philadelphia to Kingston and back, the contract and its faithful performance by the libellant is admitted by the answer, and the difference between the amount claimed, and that admitted to be earned, is but trifling.

The controversy arises on an account set up by the respondent in bar of the claim for wages, by way of set-off, or payment, to which the libellant has demurred; because the contract on which the account is founded, was made and to be performed in the county of Philadelphia, and therefore not cognizable in the admiralty, as also because the admiralty cannot entertain pleas of set-off.

As the first ground of demurrer goes to the jurisdiction of the court, it must be first considered.

The first item of the account of the respondent is a balance of account of \$1 dollars, due in 1822, the items composing it not being stated, but averred generally in the answer to have been for provisions furnished by the respondent for different vessels, owned or commanded by the libellant, and a pump for the sloop Polly, so owned and commanded. The judicial power of the United States extends to all the cases enumerated in the third article of the constitution, but to none other; as this account is between two citizens of Penn-

[*Bains v. The Schooner James and Catherine.*]

sylvania, it is not cognizable by the courts of the United States, unless it presents a case arising under the constitution, laws or treaties of the union, or is a subject of equity, of admiralty or maritime jurisdiction. The first is not pretended, and it is therefore incumbent on the respondent to bring his case within the other provisions of the constitution.

To do this it is necessary to show that at the time of its adoption, cases of this description were cognizable in the admiralty in any shape, whether by original libel, counter claim, or set-off, arising from either the nature of the contracts, its subject matter, or application; for as a mere balance of account, there can be no pretence that it is any other than a contract at common law, cognizable only in courts of law.

There is nothing in the nature or subject matter of the account which can vary its character, it is to be performed on land within the jurisdiction of this state; it is subject to none of the casualties, conditions, terms, or peculiar obligation of marine contracts. The credit is not given or accepted on any express or implied pledge of ship, cargo or freight, or on the faith of either, the answer contains no such allegation. Neither does it specify the kind of provisions furnished, their quantity or use, whether in port or on a voyage; or whether they were purchased by libellant as owner or commander of the respective vessels, or set forth any circumstances which vary it from a case of mere personal credit. Taking the account then as it is stated, and the application of the items to have been as alleged, it presents no one feature of a marine contract, or any maritime attribute or quality to which any part of admiralty or maritime law can apply. It is, in the words of the constitution, "*a case in law*," not a controversy "between citizens of different states," but of the same state, cognizable only in the federal courts, by the principles of the common law, if the plaintiff was competent to sue therein.

The counsel for the respondent has ably and ingeniously endeavoured to establish the position, that the admiralty has jurisdiction in personam over all contracts for materials and provisions furnished, and labour performed in building, repairing, equipping and provisioning ships; in doing which he has entered into a very extensive range of investigation of the jurisdiction of courts of admiralty, a subject on which great contrariety of opinion has existed and yet exists among the most learned judges and jurists of this country. It was once a very vexed question in England, between the courts of Westminster Hall, which were governed by the common law, and the

[*Bains v. The Schooner James and Catherine.*]

admiralty courts, which acted under the orders of the king in council, and proceeded according to the principles of the civil law; but after a long struggle the latter yielded, and their proceedings have for more than two hundred years, been constantly controlled and held in restraint by the courts and rules of the common law. The decisions on this subject have often been reviewed and commented on in our courts, but without any satisfactory results, and there has been no decision of the supreme court settling the question.

There is a dictum in the case of the *General Smith*, 4 Wheat. 443, stating the opinion of the court, in affirmance of the admission of counsel of the claimant, previously made in argument, that the admiralty had a general jurisdiction in cases of material men, both in personam and rem; but this point formed no part of the judgment of the court, was not before them, and could not be settled by this declaration of an abstract opinion in a case, where a ship was libelled on a claim which was adjudged by the court to be no lien in the case before them. 2 Pet. 413. The court did not take the point to be settled eight years afterwards, when it came up in the case of *Ramsay v. Allegre*; they did not consider the general question of jurisdiction, but decided the case on other grounds, 12 Wheat. 611, 613. Mr Justice Johnson, who was one of the court when the opinion in the case of the *General Smith* was delivered, considers the remarks on this subject as mere dicta, and dissents from them in a very able, learned opinion, in which he utterly denies the jurisdiction of the admiralty in personam, in the cases referred to.

Not being then bound to take the law as settled by the opinion of the judges as declared in 4 Wheaton, and finding that the decisions of the different circuit courts are in direct contradiction on the subject of this branch of admiralty jurisdiction, I am at liberty to consider it, as not so firmly established as to make it improper for me to be guided by my own judgment of the law as it was settled before the adoption of the constitution. The jurisdiction of the courts of admiralty in England, is a part of the royal prerogative conferred on the lord high admiral by the king's commission, 4 Co. Inst. 124, and exercised by his deputies and inferior officers forming courts of different grades, from the highest of which an appeal lies to the king in council; but not being courts of record, their proceedings cannot be reviewed according to the course of the common law, and no act of parliament has provided for an appeal to the house of lords, as from the high court of chancery. Vide 3 Bl. Comm. 69.

[*Bains v. The Schooner James and Catherine.*]

The jurisdiction of the admiralty was deemed a jewel of great lustre and value in the diadem or crown of the king, and was carried to great extent by the lord high admiral and his officers; but however it might be cherished and enlarged by them, in order to extend the king's and their power, and promote their interest, it was odious to the commons of England, who became alarmed at the encroachments upon the jurisdiction of the courts of common law, and called loudly for the redress of the grievance.

Similar complaints were made against the encroachments of the court of chivalry, which was composed of the lord constable and earl marshal, which had consue of deeds of arms, and of things touching arms, which could not be determined by the common law, and remedies were provided for both cases.

The statute 13 Rich. 2, ch. 2, 1 Ruff. 385; Keb. 173, prohibited the court of chivalry from entertaining any plea "that might be tried by the law of the land," and provided a remedy by a writ compelling them to surcease proceedings. Chapter 5 prohibited the admiral and his deputies from meddling with any thing done in the realm, and on the sea only as it had been used in the time of Edw. 3, 1 Ruff. 385; this statute proving insufficient, another was passed, on the grievous complaint of all the commons, in 15 Rich. 2, ch. 3, 1 Ruff. 400; Keb. 180, the prohibition of the admiral's jurisdiction was more explicit and extensive, excluding it from all things done in the body of a county, as well by land as by water, or wreck of the sea.

The parliament, finding that laws merely prohibitory, did not prevent the encroachments of the admiralty, again interfered in 2 H. 4, ch. 11, on the prayer of all the commons, and passed an act authorizing the party aggrieved by any usurpation and exercise of admiralty jurisdiction, to sue the plaintiff, and directed that he should recover double damages, declaring that the statute and common law should be holden against the admiral and his deputies, 1 Ruff. 438; Keb. 193. As this statute empowered the courts of common law to vindicate its principles, and secure the right of trial by jury by amercing plaintiff in the courts of admiralty in heavy and double damages; and as the court of king's bench, in the exercise of its high prerogative and supervisory powers over all inferior courts and tribunals, issued writs of prohibition which neither the admiral or his deputies dared to disobey, they were compelled to submit to the statute and common law of the kingdom, in civil and criminal cases.

[*Bains v. The Schooner James and Catherine.*]

But they yielded with a bad grace. In the 8 Jac. 1, more than two hundred years after the statute of 2 Hen. 4, the lord high admiral made a formal complaint on the subject to the king, against the judges, concerning prohibitions granted to the court of admiralty.

The fifth grievance complained of by the admiral is worthy of special attention. "That the clause of *non obstante statuto*, which hath foundation in his majesty's prerogative, &c., is current in other grants; yet in the lord admiral's patent, is said to be of no force to warrant the determination of the causes committed to him in his lordship's patent, and is rejected by the judges of the common law."

Such was the audacity of the pretensions of the admiralty, that it claimed to exercise jurisdiction in virtue of the king's patent, in defiance of the acts of parliament; and the complaint against the judges was, that they enforced the supreme law of the kingdom. On a reference of the complaint by the king to the judges, they met it by acts of parliament, judicial proceedings, and adjudged cases, which exposed and put an end to the audacious claims asserted by the admiralty, 4 Coke's Inst. 134, 142. This occurred in the reign of Jac. 1, from which time the statutes in restraint of admiralty jurisdiction have been observed and enforced by the courts of common law, so as to prevent any encroachment by prerogative courts, in contravention of the established laws. It is not necessary for me to examine in detail the adjudged cases in the English courts, it would be useless, after the able review of them by Judge Johnson in *Ramsay v. Allegre*, 12 Wheat. 614, &c., as to the claims of material men to proceed *in personam* in the admiralty, and by a very distinguished jurist and statesman who presided in the state court of admiralty in this state, during and after the revolution, as to the same claim to proceed *in rem*. The conclusion to which both arrived was, that such claim was inconsistent with the law as it existed in England before, and in the United States after the separation. It is also needless to combat the proposition, that the civil jurisdiction of the admiralty was more expanded in the colonies than in the mother country; or that it could be exercised in opposition to the established course of the law of England, without an act of parliament to authorize it. As appeals lay from the colonial courts of admiralty, the line of their jurisdiction was necessarily that which was the rule for the appellate court. The courts of both the colonies and mother country, were organized on similar principles; each with its appropriate jurisdiction, as prescribed by statutes or regulated by usage, the evidence of which is in the

[*Bains v. The Schooner James and Catherine.*]

adjudications of the courts in England, and those of the colonies and the states, which acted on the rules established by early statutes, and their uniform construction down to the revolution. The civil jurisdiction of courts of admiralty was confined to matters arising on the sea, out of the body of any county, and to subject matters in their nature maritime, or done in the prosecution of a voyage. Courts looked to the nature of the act done, as well as its locality, and though the act was done on shore, as the pawning a ship for the emergencies of a voyage, yet being of a maritime nature, and the cause rising on the sea, it was cognizable in the admiralty. 6 Rob. Ad. 40; Bee's Ad. 420, 435; Hob. 11; 1 Salk. 35. If a vessel is taken as prize, the legality of the capture must be tried in the admiralty, 1 Rob. Ad. 238; Bee's Ad. 371; Doug. 591, 597; so of a cause of action growing out of a capture as prize, Bee 372; or if goods are taken piratically at sea, they may be followed in the admiralty on land, because the original cause arose at sea, 3 Bulstr. 29; Cro. Eliz. 685. But if a mere trespass is committed at sea, or the original cause arises on land, or on the sea, in the body of a county, or is not of a maritime nature, though arising on the sea, the cognizance thereof belongs to courts of common law, who will prohibit the admiralty from proceeding therein, Bee 435; 4 Co. Inst. 134; Hob. 212; 2 L. R. 805.

Such is the admitted course of proceeding by the statute and common law of England. But it is alleged, that the jurisdiction of courts of admiralty in the United States is more extensive, and that the constitution has re-established it, as it was claimed by the admiralty before the restraining statutes of Rich. 2 and Hen. 4, and that it may now be exercised in all cases, where it is authorized by the civil law, or had been exercised under the king's commission to the admiral. Should this construction be given to the constitution, it will present, in striking contrast, the opinion of the people of the states who adopted it, and the opinion of the people of England, during the four hundred preceding years, on the right of trial by jury, and the preference of the common to the civil law. It will also present in as striking a view, the great difference between the opinions of those who composed the first congress of the revolution, and the members of the convention, who framed the constitution, in relation to admiralty jurisdiction, in all its branches.

In the preamble to the declaration of the rights of the colonies in October 1774, one of the grievances complained of was, that parliament had, by late acts, "extended the jurisdiction of courts of admi-

[*Bains v. The Schooner James and Catherine.*]

rality not only for collecting the said duties, but for the trial of causes merely arising within the body of a county."

In the fifth resolution it is declared, "that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

It was also "resolved, that the following acts of parliament are infringements and violations of the rights of the colonists, and that the repeal of them is essentially necessary in order to restore harmony between Great Britain and the American colonies, viz.: the several acts of (naming them) which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, &c., are subversive of American rights." Vide Journals of Congress 27, 29, 14th of October 1774.

Among the grievances enumerated in the declaration of independence, is the following: "for depriving us in many cases of the benefit of trial by jury." These declarations show that the same spirit which actuated their ancestors in England, descended to the colonists with equal zeal, in favour of the common law, the right of trial by jury, the restriction of admiralty jurisdiction *to its ancient limits*, and against its exercise "*over causes merely arising within the body of a county.*" It is not credible that principles, thus consecrated, would be abandoned by the people of the colonies, when they made themselves states, by their declaration of independence, or that they solemnly reversed them when they adopted the constitution. No state ever passed any law in accordance with the acts of parliament which led to the revolution, which in any way abridged the right of trial by jury, even in civil cases, or abrogated any principles of the common law, by substituting in their place the rules of the civil law, which had not been adopted in the mother country. Nor is there any pretence that the admiralty courts, in any of the states, between the declaration of independence and the adoption of the constitution, had ever assumed the jurisdiction of civil causes not cognizable by the courts of admiralty in England. On the contrary, all such courts whose decisions are known, have asserted and acted on the principle that their admiralty jurisdiction was confined to the cases, and must be exercised by the rules which had defined it in England. The able and learned opinions of Judge Francis Hopkinson, in the admiralty court of Pennsylvania, in *Dean v. Angus*, in 1785, Bee's Ad.

[Bains v. The Schooner James and Catherine.]

Rep. 370, &c., and in *Clinton v. The Brig Hannah*, in 1781, Bee 419, are full and conclusive on the subject. His character as a jurist and statesman is well known to all of us, we cannot presume him to have been ignorant of the law of courts of admiralty, or withhold from his opinions the high respect to which they are justly entitled.

Another distinguished civilian, Judge Bee of South Carolina, also examined the subject most ably in *Shrewsberry v. The Sloop Two Friends*, in 1786, Bee 433, 440, and laid down the law in the same way. Judge Peters uniformly adopted the principles on which Judge Hopkinson acted, 1 Pet. Ad., preface, V. He held that the people of the states had adopted the common law, and the maritime law as a part of it, existing at the revolution, 1 Pet. Ad. 112, and laid down the broad proposition that "the maritime laws of England existing before our revolution, and consistent with our situation are yet our laws. It is but recently that admiralty cases have been published. We have therefore unavoidably recourse to their common law books for authority." 1 Pet. Ad. 229, 230.

Few men were more familiar with the jurisprudence of the states, or the political history of the country, than Judge Peters, from before the revolution till the adoption of the constitution; the high authority of his opinions, concurring with Judges Hopkinson and Bee, is the highest judicial evidence which we can have, of the nature and extent of admiralty jurisdiction as it existed, when the states granted it by the constitution to the courts of the United States. It was a jurisdiction limited and defined by the statute and common law, its boundaries had been declared by adjudications in the courts of the states, so recently before the framing of the constitution in convention, that they must have been familiar to the members. To the states in which courts of admiralty had been long held, its jurisdiction was well known, and in the absence of any judicial authority under the governments of the states, in opposition to what has been referred to, we must consider this jurisdiction to have been granted, precisely as it had been previously exercised.

As the obnoxious acts of parliament ceased to have any force after the declaration of independence, the jurisdiction of courts of admiralty which those acts conferred, necessarily ceased with them, and could not be exercised without the authority of a state law. All matters relating to revenue, the regulation of commerce and navigation, were therefore cognizable only in the courts of common law in the several states, as they were in England from time immemorial;

[*Bains v. The Schooner James and Catherine.*]

for the most strenuous advocates of the admiralty never pretended that it had jurisdiction over these subjects prior to the statutes of Richard 2.

The criminal jurisdiction of offences committed on the sea, within the body of a county, was made cognizable by a special court organized by the statute 28 Hen. 8, ch. 15, 2 Ruff. 258, which was directed to proceed according to the course of the common law, 3 Co. Inst. 111; when the offence was committed on the main sea or the coasts of the sea, being no part of the body of any county, it was declared to be cognizable in the admiralty by the statute 27 Eliz. ch. 11, 4 Co. Inst. 137.

From this time the line which separated the jurisdiction of admiralty in all its branches from that of the common law, remained firmly settled, and the jurisdiction of the common law over matters excluded from the admiralty was unquestioned. All causes arising in the body of a county, or arising on the sea, unless of a maritime nature, were cognizable by the courts of common law, and the principles on which they granted prohibitions to courts of admiralty, were as much a part of the common law as the rules of descent. It was a part of that great system of English jurisprudence which the colonists adopted in its largest sense, 1 Gall. 493, as a general and fundamental law, unless altered by acts of assembly, or was not adapted to their condition, 1 Dall. 67; 9 Serg. & Rawle 330, 358; 11 Serg. & Rawle 273; 9 Cranch 333, which the people of each state claimed as their birthright, from the beginning of the revolution. As this system is the basis of the judicial institutions of all the states, it is incumbent on those who assert that any part of it is not in force, to prove it as an exception. 9 Serg. & Rawle 334. Especially is it incumbent on those who assert that the people of the American colonies or states were more in favour of the extension of admiralty jurisdiction *beyond its ancient limits*, so as to embrace *the trial of causes merely arising within the body of a county*, and less attached to *the inestimable right of trial by jury* than their English ancestors, to establish it by irrefragable proof. The unanimous declaration of rights by the congress of 1774, expressed the then sense of the people of the colonies, and there has never been a jurist or statesman who has controverted the principles of government and policy therein promulgated. On the contrary, these principles have been adopted as the foundation on which the state and federal constitutions have been built.

[*Bains v. The Schooner James and Catherine.*]

In the grant of judicial power over cases of admiralty and maritime jurisdiction to the courts of the United States, the right of trial by jury of all crimes (except in cases of impeachment) is carefully secured; "and such trial shall be had in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as congress may by law have directed, article three, section two, clause three, of the constitution of the United States." The sixth amendment is still more explicit. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

These provisions go to the root of the criminal jurisdiction of the admiralty, over offences committed on the high sea; thus far the American people have solemnly affirmed their declaration of rights, and excluded from the admiralty a branch of jurisdiction which the statutes of England authorized them to exercise. It remains to inquire whether they have, by the same instrument, enlarged the civil jurisdiction of the admiralty, so as to extend it to causes arising within the body of a county, which were cognizable exclusively by the courts of common law in England.

In pursuing this inquiry, I am not at liberty to overlook the view of the constitution which has been taken by the supreme court; or if I was, I would not be so presumptuous as to attempt to make a better one than is to be found in their opinion in *Parsons v. Bedford et al.*, 3 Pet. 446, 447.

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'in suits at common law, where the value in controversy shall exceed

[*Bains v. The Schooner James and Catherine.*]

20 dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority,' &c. and to all cases of *admiralty and maritime jurisdiction*. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the constitution denominated in the third article 'law;' not merely suits, which the *common* law recognised among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, (which was contemporaneous with the proposal of this amendment; for in the ninth section it is provided, that 'the trial of issues in fact

[*Bains v. The Schooner James and Catherine.*]

in the *district courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by jury ;' and in the twelfth section it is provided, that 'the trial of issues in fact in the *circuit courts* shall in all suits, except those of *equity*, and of *admiralty and maritime jurisdiction*, be by jury ;' and again, in the thirteenth section, it is provided, that 'the trial of issues in fact in the *supreme court* in *all actions at law* against citizens of the United States, shall be by jury.' "

This view of the constitution and seventh amendment, is in perfect accordance with the spirit of the revolution, and perpetuates the principles of the congress of 1774, as settled constitutional law.

As the extension of admiralty jurisdiction beyond the line prescribed in England is necessarily a deprivation of the right of trial by jury, and a substitution of the civil for the common law in cases cognizable only by the latter in 1774 ; any construction which will give to the term *admiralty and maritime jurisdiction*, a more expanded meaning than the term had in England, must be rejected. In the emphatic language of the supreme court "the want of an express provision securing the right of trial by jury in civil causes, led to the adoption of the amendment ;" it is therefore the bounden duty of every court, to so construe it as to effect that object. "In a just sense the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." In defining "*suits at common law*," in the amendment, the supreme court declare the term to be, what is denominated "*cases in law*" in the third article of the constitution ; what then are such *suits* or *cases*, the court gives the answer, "not merely suits which the common law recognised among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered ; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, were often found in the same suit." Adhering to this definition, the constitution becomes intelligible, in its reference to the three classes of cases to which the judicial power extends :

1. *Cases in law*, or *suits at common law*, wherein legal rights are to be ascertained, and legal remedies administered according to the old and established proceedings at common law.

2. Cases or suits in equity where equitable rights only are recognised, and equitable remedies administered.

[*Bains v. The Schooner James and Catherine.*]

3. Cases or suits in the admiralty, where there is a mixture of public or maritime law and of equity in the same suit.

Whether there is not a fourth class of cases, those of *maritime* jurisdiction independently of those of admiralty, need not now be examined.

It is next to be inquired by what rule or standard we are to ascertain what is a case in law, equity or admiralty, as contradistinguished from each other? The only rule furnished by congress, is in the acts regulating process in the courts of the United States, which provide, that the forms of writs, executions and other process in suits at common law, shall be the same as used in the supreme courts of the respective states; "in those of equity and admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law, 1 Story 67, 257. No act of congress has defined this line of contradistinction, no state laws had done it before the adoption of the constitution; the jurisdiction of the respective courts had been well settled, and was well understood previously, so that no new statutory definition was necessary. The existing judicial systems of the states had been founded on the principles of the English jurisprudence, the application of the principles of the common law was universal as the rule of jurisdiction, unless altered by local statutes or usage. Hence we find that in the judiciary act, congress refer to "*the common law,*" "*the principle and usages of law*" as terms of definite import, referring to the common law, and as adopted in the states, 10 Wheat. 56, 58. In the ninth section giving admiralty and maritime jurisdiction to the district court is this expression; "saving to suitors in all cases, the right of a common law remedy in all cases where the common law is competent to give it," "and shall have cognizance of all suits at common law," &c. The eleventh section gives the circuit court jurisdiction of "all suits of a civil nature at common law or in equity," &c. the thirteenth section authorizes the supreme court, "to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law," &c. The fourteenth section gives the circuit courts power to issue writs not specially provided for agreeably "to the principles and usages of law." The fifteenth section gives them power to compel the production of papers "in cases and under circumstances where they might be com-

[*Bains v. The Schooner James and Catherine.*]

pelled to produce the same by the ordinary rules of proceeding in chancery." The sixteenth section provides that *suits in equity* shall not be sustained in any case where complete remedy can be had at law.

The seventeenth section authorizes new trials to be granted "for reasons for which new trials have been usually granted *by courts of law* ; vide 1 Story 56, 58 ; indeed the whole legislation of congress in relation to the judicial system of the United States, shows their reference to a pre-existing system, to which the terms they use are to be applied. Neither the constitution, the amendments, or laws, give a definition of *law, equity, admiralty, or trial by jury,*" but the terms are not consequently indeterminate, or open to any construction which may be put upon them ; they must be taken in the sense in which they have been universally understood through all time, by the people, the conventions and governments of the states and union. The jurisprudence of England is the test and standard to which these terms are to be referred, and by which they are clearly defined. In *Robinson v. Campbell* the supreme court declare, "that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles ; 3 Wheat. 222, 223 ; and as the courts of the union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." 4 Wheat. 115.

So far then as relates to the respective jurisdiction of courts of law and equity, under the constitution, its amendments and the judiciary act, as construed by the supreme court ; the jurisprudence of England is the test and standard of reference. The next question is to what period of time this reference is to be made ; on this subject there is little or no difference of opinion. The people of the several states, delegated to the United States a judicial power over cases at law, equity and admiralty, according to the rules and principles established in England before the revolution, according to general opinion ; and according to the opinion of some, at the adoption of the constitution and passage of the judiciary act. Certain it is, that all laws which extended to the colonies before the revolution, which

[Bains v. The Schooner James and Catherine.]

were adopted by usage or acts of assembly, were enforced as a part of the jurisprudence of the states, as well as the common law. Statutes also which were "passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law;" *Patterson v. Winn*, 5 Pet. 241 ; and the construction of such statutes which prevailed at the revolution is the rule for the courts of the United States. *Cathcart v. Robinson*, 5 Pet. 280, 281. It only remains to inquire, whether the framers of the constitution, its amendment, and the judiciary act, intended to make the English system the standard by which to test the respective jurisdiction of the courts of law and equity, and the civil law the standard of admiralty jurisdiction ; or whether it was intended to refer to the English system, as it was settled at the revolution, the adoption of the constitution, or passage of the judiciary act, to ascertain what was a case in law or equity ; but to go back four hundred years, and ascertain by the law of England as it was understood before the restraining statutes of Richard 2, passed in 1389, Vide 1 Ruff. 385, what was a case in admiralty at that time. If the advocates of an admiralty jurisdiction, broader than consists with the statutes and common law of England, take the first position, the seventh amendment is necessarily annulled ; for if a case arises which is by the English system *a suit at common law*, the amendment embraces it, and there must be a trial by jury. If a suit on such a case is sustained in the admiralty according to the civil law, there is no trial by jury, and the amendment does not apply ; such a result makes the amendment contradict itself. If by the English law, a given case is one confessedly cognizable only by a court of common law, yet by the civil law it is as clearly cognizable in the admiralty ; then if the amendment refers to the former for the definition of a suit at law, and the constitution refers to the latter for the definition of a suit in the admiralty, the amendment is a *felo de se*, as well as directly subversive of the object, which the supreme court declare it was passed to effectuate, *To supply the want of an express provision in the constitution, securing the right of trial by jury in civil cases.* The defendant is excluded from a trial by jury in the very case provided for by the amendment. The constitution and amendment must of course be referred to the same system for the definition of the three classes of cases, or the constitution controls the amendment by the grant of a jurisdiction to the admiralty, over a "suit at common law," in which the trial by jury is secured. Such a doctrine would subvert

[*Bains v. The Schooner James and Catherine.*]

the government, by making the constitution of paramount authority to the power which created, and can amend it in all its provisions, except the equal representation of each state in the senate.

If by assuming the other position the terms law, equity, admiralty are referred for their definition and contradistinction from each other to different periods, it will be attended with difficulties which cannot be surmounted.

It must be taken to be the settled construction of the constitution by the supreme court, that the terms "*cases in law and equity*, refer to the line drawn between the respective courts in England, at some period. Assuming that to have been the 13 Rich. 2 (1389), we go back to a time when there was neither a court, or a system of equity jurisdiction, as contradistinguished from law; those who contend that the system of federal jurisprudence was intended to be organized on the model of that of England at that period, must be left to establish the proposition as they can, to reason upon it seriously, is difficult for those who oppose it. It is as difficult to reason on the proposition, that the framers of the constitution referred to the state of the law at that period, to ascertain what was a case of admiralty jurisdiction, while they referred to a period four hundred years later to ascertain what was a case of common law or equity jurisdiction. The same difficulty attends the discussion of the proposition, that when the common law was adopted in the colonies, the states, the constitution and judiciary act; that part of it should have been excluded, in virtue of which the courts of common law issued prohibitions to the admiralty, and all other prerogative courts. This is certainly not a time to contend, that it is congenial to the spirit of American institutions, to adopt the principles of courts proceeding according to the course of the civil law, under a patent of *non obstante statuto*, and without a trial by jury, in preference to the rules and principles of the common law.

Nor can it be necessary to enter upon an argument to show that the statutes of England, though passed before the settlement of the colonies, which restore the common law, secure the trial by jury, and confine all courts within the line which the law prescribes for their jurisdiction, are in accordance with all our institutions, suited to the condition of the colonists, and were adopted by them as part of the common law.

It has been shown that the jurisdiction of the admiralty, was asserted in virtue of the king's prerogative to dispense with acts of par-

[*Bains v. The Schooner James and Catherine.*]

liament; the assertion of such a right by James 2, was deemed so subversive of a fundamental principle of the English constitution, that it was declared to be an abdication of the crown at the revolution of 1688, 4 Ruff. 440.

Whether the people of the United States intended by their constitution of 1788, to re-establish the supremacy of prerogative over law, or to authorize the district court to exercise a jurisdiction commensurate with that claimed by the admiral in his appeal to James 1, as more congenial to the spirit and principles of the revolution of 1776, than the principles of their ancestors, is not deemed worthy of further inquiry. Certain it is, that the fear of such an assumption of jurisdiction, led to the seventh amendment, which was intended to remove all doubt by placing the right of trial by jury in suits at common law, beyond the danger of violation by any power under the constitution, "and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people," 3 Pet. 446. A fundamental guarantee of the rights and liberties of the people, by sanctioning an admiralty jurisdiction according to the civil law, which repudiates the trial by jury, or on the principles asserted by the admiralty in England, in virtue of royal prerogative! If this is the only security left for the right of trial by jury in civil cases, the amendment has been made in vain, for the admiralty is left open to every plaintiff, who can bring his case within the rules of the civil law, or the English admiralty, according to their pretensions, prior to the statutes of Rich. 2, in which the defendant cannot have the benefit of this "fundamental guarantee;" wholly abjuring any construction of the amendment, which would make it a fundamental and solemn mockery, I feel bound to give it a practical meaning, consistently with the solemn, repeated and uniform decisions of the supreme court.

An amendment to the constitution, annuls all jurisdiction which the constitution grants, whether past, present or future, which is contrary to the amendment; it arrests the action of even the supreme court, in cases depending before them prior to the adoption of the amendment, and operates as an absolute prohibition to the exercise of any other jurisdiction than dismissing the suit, 3 Dall. 382, 383; 6 Wheat. 405, 409; 9 Wheat. 868. The supreme court has declared the object of the seventh amendment, and inferior courts must so construe and enforce it as to effectuate that object. This fundamental guarantee of the right of trial by jury, applies to all cases or suits which

[*Bains v. The Schooner James and Catherine.*]

the common law recognises among its old and settled proceedings, in which legal rights are to be ascertained, and legal remedies administered, whatever may be the peculiar form which they may assume, 3 Pet. 447. These are cases or suits at law; let the plaintiff resort to what court he may, it does not change their nature, they cannot be cases in equity or admiralty, as contradistinguished from courts of law; the term a *case* or *suit at law*, refers to the cause of action, the remedy, and the mode of enforcing it, not to the forum to which the plaintiff may choose to resort. This is the meaning of the term in the constitution and amendment as judicially settled, it is also the manifest meaning of the judiciary act, which was passed at the same session of congress in which the amendments to the constitution were recommended to the states.

By the ninth section, the district court has "*exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction;" by the eleventh section, the circuit courts have "original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity," &c. From these two sections three propositions necessarily follow; 1. If the suit is one of admiralty jurisdiction, its cognizance is exclusively in the district court, and it cannot be sustained in a circuit or state court; 2. If it is a suit at common law or in equity, it can be sustained in a circuit or state court; and 3. Such cases cannot be sustained in a district court, as a case of admiralty jurisdiction.

In thus distributing the judicial power among the inferior courts, and assigning to each the cognizance of particular cases, congress have evidently done it with a reference to some antecedent pre-existing rules, which distinguished the different classes of cases from each other; they have also intended to refer to some system which has defined them by such lines as will prevent a collision between the different courts, on the subject matters of their respective cognizance. Those rules cannot be found in the civil law, which does not distinguish cases at law from cases in equity; and as that code recognises neither suits at common law, courts of common law, or trial by jury, it is so utterly incompatible with the judiciary act, that their repugnance is apparent at first blush. It is therefore a self evident proposition, that the jurisprudence of the United States is not founded in the civil law, and that a reference must be had to some other system to define what is a case at law or in equity; it is equally evident that the definition of a case of admiralty jurisdiction, must be

[Bains v. The Schooner James and Catherine.]

sought in the same system which defines the other cases, otherwise the courts will be involved in perpetual conflicts of jurisdiction. Conclusive as this view of the ninth and eleventh sections is, from their language and the subject matter to which they refer ; the provisions of the thirteenth and fourteenth sections are too positive to leave a doubt as to the system of jurisprudence on which the courts of the United States were organized.

The supreme court "shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States." 1 Story 59.

The fourteenth section gives to all the courts power to issue "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In referring to which term, "agreeable," &c., the supreme court say, it doubtless embraces writs sanctioned by the principles and usages of the common law. 10 Wheat. 56.

It being the settled doctrine of the supreme court, that by the terms "principles and usages of law," congress refer to the common law, the conclusion follows, that the common law is the standard by which to ascertain what are proper cases for a prohibition to a court of admiralty, and not the civil law ; still less those principles on which the admiralty courts in the time of Jac. 1, protested against the right of the king's bench to grant prohibitions. This section of the judiciary act, is therefore a decided and express repudiation of the past and present pretensions of the admiralty to the cognizance of any cases where prohibition would be granted in England ; that it is constitutional cannot be doubted, as the supreme court in the case of the United States v. Richard Peters, district judge, affirmed their authority under this section by issuing a prohibition. 3 Dall. 121, 129.

A reference to the act of congress for the regulation of process in the courts of the United States, will show that the rules of the civil law have been carefully excluded. By the process act of 1789, the forms and modes of proceeding in causes of equity and of admiralty and maritime jurisdiction, shall be according to the course of the civil law, 1 Story 67 ; but by the act of 1792, the form and modes of pro-

• [Bains v. The Schooner James and Catherine.]

ceeding in such cases were directed to be, “ according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law.”

1 Story 258. We must then resort to that system of jurisprudence, in which there are courts of common law, as contradistinguished from courts of equity and admiralty; to resort to the civil law for the rules which define the respective jurisdiction of these courts, when congress have excluded them as to the forms and modes of proceeding, would be manifestly opposed to the law. Such resort would also be useless, as the civil law recognises no courts of common law. Both of these acts have been deliberately examined by the supreme court, in *Wayman v. Southard*, they declare that “ the forms of writs and executions and modes of proceeding in suits at common law, and the forms and modes of proceeding in causes of equity and admiralty and maritime jurisdiction, embrace the same subject, and both relate to the progress of a suit, from its commencement to its close,” 10 Wheat. 29; the term, “ *forms and modes of proceedings*, embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination.” 10 Wheat. 32. “ This section (second section of the act of 1792) then goes on to prescribe the rules and principles by which the courts of equity and of admiralty jurisdiction were to be governed,” *United States Bank v. Halstead*, 10 Wheat. 58, governed from the commencement of the suit; jurisdiction of course is included, and trial by jury preserved. The whole system would be deranged, by adopting the civil law as the rule of jurisdiction, and regulating and governing the forms and modes of proceedings by rules, principles and usages which were unknown to that code, and known only in that system in which courts of common law are recognised, as contradistinguished from those of equity and admiralty jurisdiction.

There is another view of our system of federal jurisprudence, which leads to the same conclusions.

The judicial power of the United States is confined to the cases enumerated in the third article of the constitution; all others remain under the exclusive cognizance of the states, as a part of their powers, referred by the tenth amendment; the eleventh section of the judiciary act also leaves to state courts a jurisdiction over the cases therein enumerated, concurrent with the circuit courts. Any exercise of jurisdiction by the district court in admiralty, over cases at law or in equity, must therefore clash with that of the courts of the

[*Bains v. The Schooner James and Catherine*]

several states, as well as of the circuit courts. This will be avoided by adhering to the line of separation between the respective courts, as designated by the statute and common law of England, at the revolution or adoption of the constitution, and the system will be harmonious and consistent in all its parts, both federal and state. On the other hand, by attempting to introduce the admiralty jurisdiction of the civil law, or those principles which were asserted in early times in its favour, a foundation is laid for interminable conflicts of jurisdiction between the courts of the state and the union. Conceding, *ex gratia*, that the constitution admits of two constructions, that the seventh amendment does not remove the doubt, that the judiciary act does not exclude cases at law and equity, as defined by the common law, from the cognizance of courts of admiralty, and that the provisions of neither will be violated by the exercise of admiralty jurisdiction as claimed before the statutes which restrained it. It cannot be denied that they admit of a different and more obvious construction, more conducive to the harmonious movements of the two systems of state and federal jurisprudence ; and which ought to be adopted, if it can be done consistently with the words, or spirit of the constitution and laws. The decisions of the supreme court have conclusively established the principle that the terms *cases in law and equity* in the constitution, and *suits at common law*, in the seventh amendment, are therein used as they are defined by the common law ; some powerful reasons ought therefore to be given why the term "*cases of admiralty and maritime jurisdiction*" have not been used according to their common law definition, but in reference to its definition in a system, in all respects in collision with the common law. No such reasons have been given in argument, or appear in any of the cases referred to.

If there was any middle ground between the audacious pretensions of the admiralty in virtue of prerogative, and the limits prescribed by the statutes and common law of England, on which to place the admiralty jurisdiction of the district courts, there would be more reason for entertaining a doubt as to the meaning of the constitution, its amendments, and the judiciary act. But there is no middle ground on which to place such jurisdiction ; when we once break over the line which restrained it by acts of parliament and prohibitions, we are necessarily thrown back on the civil law and the royal prerogative, for the rules and principles on which the right of trial by jury depends. It is in vain to contend that the seventh amendment

[*Bains v. The Schooner James and Catherine.*]

will be any efficient guarantee for this right, in *suits at common law*, if an admiralty jurisdiction exists in the United States, commensurate with what is claimed by the claimant in this case. Its assertion is, in my opinion, a renewal of the contest between legislative power and royal prerogative, the common and the civil law, striving for mastery; the one to secure, the other to take away the trial by jury; and until the authoritative judgment of a higher court shall make it my duty to surrender my judgment to their decree, it will never be sanctioned by me. Judicial power must first annul the seventh amendment, or judicial subtlety transform "*a suit at common law*, into *a case of admiralty and maritime jurisdiction*," before I take cognizance of such a case as this without a jury. Both parties are citizens of Pennsylvania, the cause of action arose in the body of a county, the contract is governed by the common law, its subject matter is not of a maritime nature, or regulated by public or maritime law; but in all its aspects, a suit upon it from its commencement to its close, is cognizable only in a state court.

Viewing the question on which this case must turn, as involving most important consequences, I have given it a consideration not called for by the small amount in controversy, but called for on account of the principles it involves, as well as my duty to the profession and suitors, in cases which may come to this court by appeal.

If it should be thought that any of the foregoing principles would shake the jurisdiction of the admiralty over contracts for seamen's wages, it must be admitted that the objection would have great, if not conclusive force, if the question was a new one; but in deciding on this, and other great questions of power, whether of courts or legislatures, the proper inquiry for a judge, is not merely into the original principle on which it depends, but also the practical, undisturbed, unquestioned exercise of jurisdiction for a long course of time. It is not only a powerful reason in favour of its legitimate existence, but to question it after it became recognised by all departments of the government, might tend more to shake foundations, than an adherence to a principle at first erroneous.

In England, the statutes of Richard 2, or Hen. 4, have never been applied to suits for seamen's wages. Courts of common law have not issued prohibitions to the admiralty, against the exercise of this part of their jurisdiction; the judges have considered it as not embraced in the statutes, but as an exception to them, or sanctioned by the maxim of *communis error facit jus*. The reason is immaterial,

[Bains v. The Schooner James and Catherine.]

the matter is at rest by common consent, the jurisdiction of the admiralty is unquestioned there, as a practical undisturbed construction of ancient statutes. So it is here. It has been exercised in the states before the confederation, from its adoption till the adoption of the constitution, and since then by the federal courts. In *Shepherd v. Taylor*, the supreme court unanimously declared, "that over the subject of seamen's wages, the admiralty has an undoubted jurisdiction in rem, as well as in personam. Thus definitively settled, this matter is certainly not open to argument here.

Though a contract for seamen's wages is made on land, and is cognizable by courts of common law, yet they must adjudicate upon it by the rules and principles of the maritime law. The rights it creates, the duties and obligations it imposes, the penalties it inflicts, the conditions and casualties to which it is subject, are mostly unknown to the principles of the common law, and a suit upon it partakes of few of the attributes of a "suit at common law." They are prescribed and regulated by the public or maritime law, so that though the suit to enforce the payment of wages, or the performance of the price, may be at common law, yet the controversy concerning them is not necessarily a case in law. The rights to be ascertained are not *legal*, as contradistinguished from cases in equity and admiralty in the third article, and the remedy by libel in the admiralty is not the suit at common law, but that peculiar proceeding, by the mixture of public, maritime and equity law, in the same suit, which, according to not only the opinion of the supreme court, but the correct legal construction of the seventh amendment to the constitution, is not forbidden by its provisions.

So it was considered by the first congress which assembled after the adoption of the constitution, in the session succeeding that in which the same body recommended the amendments to the constitution.

In the sixth section of the act of 1790, for the regulation of seamen in the merchant service, they have a right to proceed in the district court for their wages, "and the suit shall be proceeded on in the said court, and final judgment be given, according to the course of admiralty courts in such cases used;" provided that nothing shall prevent any seaman or mariner from having or maintaining his action at common law, &c. 1 Story 105. In the previous sections of this law, there are various other provisions relative to seamen, which make the contract of service a statutory contract, peculiarly ap-

[*Bains v. The Schooner James and Catherine.*]

propriate to admiralty and maritime jurisdiction, as regulations of commerce and navigation, and the service is in its nature maritime.

But the law has made no provision for the exercise of admiralty jurisdiction over contracts for materials, labour or provisions, in building, equipping, furnishing or provisioning a ship when in our ports. Such contracts have no maritime attributes, but as to the rights and obligations imposed and arising, are regulated exclusively by the statute and common law of the states; and all controversies concerning them must be cases in law, in which legal rights are to be ascertained according to the old and settled proceedings of such courts, according to the law which regulates right and remedy, in as marked contradistinction to those in courts of admiralty, as the latter are to the former.

Such cases therefore come directly within the seventh amendment, and agreeably to its solemn and authoritative exposition, are not cognizable in the admiralty.

The next aspect in which this account is presented for consideration, is as an off-set to the demand of the libellant, for which the respondent produces no authority from any writer of authority on maritime law, or any adjudication in the admiralty, but rests on general principles of law and equity. The contract for wages is a marine one, and from its nature, and the principles which govern it, seems to me not to come within the provisions of any statutes of set-off, their equity, or any analogous principle adopted by courts of law or equity. There are cases where each party having a judgment or decree for money, in the suits in which they are respectively plaintiffs, and entitled to the process of the court for collection; and the parties and the causes of action being within its jurisdiction, the court can do justice between them, by deducting the amount of the one judgment from the other, and order process only for the balance, or where a claim, over the subject matter of which the court have jurisdiction is pending before the same court in which a defendant has obtained a judgment; a court of law as well as equity may, in certain cases, direct proceedings to be stayed, till the other party can have an opportunity of a trial or hearing. And as courts of admiralty undoubtedly possess equity powers, the same rule may prevail there; but it is not necessary to the decision of this case to enter on the inquiry, or to attempt to specify the cases in which it could be done. As the admiralty has not jurisdiction of this account, as an original claim,

[*Bains v. The Schooner James and Catherine.*]

they cannot take cognizance of it in shape of a set-off, as they have no power over the subject matter of the respondent's claim.

To subject the wages of a mariner to a defalcation on account of debts due to the owner of the ship, on matters unconnected with the particular contract, would be to deprive the former of all inducement to enter the service, which is to get bread for himself and family and secure a subsistence for them in his absence. It would be not only hard, but oppressive on him, at his return from a long voyage, to find his wages attached by a debt due the owner, or purchased by him from another, and neither stipulated or contemplated at the time of the contract to be charged upon his wages, and without any previous notice that an attempt would be made to do so.

That the owner has no such right by the marine law is very evident from the following rule. "If a mariner takes up money or clothes, and the same is entered on the purser's books; by the marine custom it is a discount or receipt of so much of their wages as the same amounts to, and in an action brought by them for their wages the same shall be allowed, and is not accounted mutual, the one to bring his action for his clothes, and the other for his wages." Molloy, b. 2, ch. 3, rule 11, p. 249.

This is certainly a direct negation of the general right of set-off, or no provision would have been deemed necessary for such case, *suggestio unius est exclusio alterius*, is an old and safe maxim of the law.

This subject has been taken up by the learned judge of the first circuit, and very ably considered; concurring fully with him in his views, and the conclusions, to which he arrived as to set-off in the admiralty, it is unnecessary to do more than to refer to his opinion, as reported in *Willard v. Dart*, 3 Mason 171.

As it is not averred in the answer, that any of the supplies of provisions were made on the faith of, or with reference to the contract for wages, it cannot be pretended that they can be considered as payment.

There are also other strong, if not conclusive objections, to this account, all the items preceding that of January 1831, are barred by the act of limitations, which might have been conclusive if it had been pleaded, and whether pleaded or not, the libellant could, at the hearing, have availed himself of the staleness of the claim and the lapse of time, on equitable principles, as settled in this court in *Baker v. Biddle* in suits in equity, and in the circuit court in the first circuit

[Bains v. The Schooner James and Catherine.]

in the case of Willard v. Dart, 3 Mason 163, &c. This case affords a very powerful reason for the application of the rule, the answer does not state whether the provisions were furnished to the libellant for the supply of vessels on his own account, or of the owners thereof. If he was merely the master, the accounts ought to be furnished seasonably before he settles with the owner, and if not done before such settlement or in a seasonable time, according to marine usage, are proper charges only against the owner.

The decree of the district court is affirmed with six per cent interest and costs.

Circuit Court of the United States.

PENNSYLVANIA, APRIL TERM 1833.

BEFORE

HON. HENRY BALDWIN, Associate Justice of the Supreme Court.
HON. JOSEPH HOPKINSON, District Judge.

JOHNSON V. TOMPKINS AND OTHERS.

On a question of slavery or freedom, the same rules of evidence prevail as in other cases concerning the right to property

A bill of sale is not necessary to pass the right to a slave.

A citizen of another state, from whom his slave absconds into this state, may pursue and take him without warrant, and use as much force as is necessary to carry him back to his residence.

Such slave may be arrested on a Sunday, in the night time, and in the house of another, if no breach of the peace is committed.

This right of the master results from his ownership and right to the custody and services of the slave by the common law, and the eleventh section of the abolition act of 1780, and other laws of this state. It is the same right by which bail may arrest their principal in another state.

The constitution and laws of the United States do not confer, but secure this right to reclaim fugitive slaves, against state legislation.

It is no offence against the laws of this state, for a master to take his absconding slave to the state from which he absconded, the offence consists only in taking a free person by force under the act of 1820, or the act of 1788.

No person has a right to oppose the master in reclaiming his slave, or to demand proof of property. A judge or magistrate cannot order his arrest or detention, without oath, warrant, and probable cause.

The master may use force in repelling such opposition, or the execution of such

[Johnson v. Tompkins and others.]

order, and the officer who gives such order, and all concerned in its execution, are trespassers.

The act of assembly does not require notice to be given to a justice of the peace, for acts done in violation of the constitution, or where he has no jurisdiction.

Where two or more persons agree to commit, or unite in the commission of an unlawful act, each who is present, or advises, consents, or in any way aids, assists, or consents to the act, is liable in trespass.

It is false imprisonment to detain another by threats of violence to his person, or deprive him of the freedom of going where he will by the well grounded apprehension of personal danger, though no assault is committed.

THIS was an action of trespass vi et armis, false imprisonment, &c.

The following is a brief outline of the circumstances.

Some time previous to the month of October 1822, negro Jack, a slave, the property of the plaintiff, absconded from his master, residing near Princeton, New Jersey, fled to the county of Montgomery, in Pennsylvania, in the neighbourhood of Hatborough, commonly called the Billet, and there was hired by the defendants, John and Isachar Kenderdine. On Sunday morning, the 20th of October 1822, the plaintiff, with his brother, Ralph Johnson, and his friends, Messrs Withington and Skilmore, left Princeton, crossed the Delaware, and about an hour before sunset arrived at the Billet, for the purpose of securing and taking up Jack as a runaway slave. They put up at the best known tavern in the village, then kept by Mr Marples. Upon ascertaining where Jack was, they left their great coats and umbrellas at Marples, and proceeded to the residence of the defendant, John Kenderdine, who lived about four miles from the Billet. They previously ordered their supper to be ready on their return, and mentioned to Marples (the landlord) the object of their visit, and what they were about to do. About dusk they arrived at Kenderdine's, there was sickness in the family, and the male members of the family were from home. Three of the four Jersey party left the wagon in the road, and went to the kitchen of the mansionhouse and knocked at the door. They were told to walk in, when one of them said an accident had happened to their wagon, and they wished help. In an instant Jack was recognised, they then said that no accident had happened, but that they used this precaution to secure him. Jack agreed to go at once. He was placed in the wagon with fetters, and upon returning to the house, and making an ineffectual attempt to obtain Jack's clothes, the party proceeded to return to the Billet. There was contradictory testimony as to certain

[Johnson v. Tompkins and others.]

threats, alleged to have been made in and on the road by the associates of the plaintiff, but it was proved that they declared that if they would go with them to the Billet, they would satisfy Isachar Kenderdine that they had the right to take Jack.

Before they started, Isachar Kenderdine had arrived at his brother John's house, and demanded their authority to take Jack. The taking was conducted so quietly that it was not heard in the sick room up stairs.

Before the party had got back to the Billet, they were overtaken by John and Isachar Kenderdine, and a large assemblage of persons, who had been collected; were attacked with stones and clubs; the plaintiff received a blow, which produced a contusion on the side of the head, and the physician pronounced it a serious wound. When they arrived at the Billet they were surrounded by a mob of forty or fifty persons, and were compelled to go at once to Judge M'Neil, an associate judge of Montgomery county, to prove their property. The plaintiff being very weak, begged to stay till morning. This was refused, and the plaintiff and one of his associates rode in their wagon, and the other two walked to the residence of the judge. Among the crowd were the defendant, Tompkins, a justice of the peace, and the constable Silas Roney, who was at that time only a spectator. When they arrived at the residence of Judge M'Neil; a partial hearing took place, and the judge recommended a further hearing as to the slavery of Jack, and that in the mean time Justice Tompkins should commit Jack to jail, and bind over the plaintiff and his associates to prosecute his claim. John and Isachar Kenderdine went to Justice Tompkins, and entered security in 800 dollars for the appearance of Jack to answer to the claim of his master. The constable and the mob then conducted the Jersey party back to the tavern, and kept them in custody till the next day.

The defendant gave in evidence that Judge M'Neil, had directed John Kenderdine to bring the plaintiff and his party before him, by force, if they resisted, but Judge M'Neil stated that he meant legal force, and when they were before him, seeing a justice of the peace (Tompkins), and the constable (Roney), in company, he believed they were brought before him by legal authority.

During the night, Withington escaped and came to the city, and it was supposed gave information to the friends of the plaintiff of his detention; the remaining three were treated with great severity, being refused even a bed. Before daylight on Monday morning, a

[Johnson v. Tompkins and others.]

compromise was agreed to by all the parties who were present, the plaintiff offered to manumit Jack and pay the expenses. A message was despatched to John Kenderdine to obtain his consent, but he peremptorily refused, declaring they should be prosecuted. On Monday morning the three Jerseymen were taken before Justice Tompkins, and security in 6000 dollars was required of them to answer the charge of kidnapping. The plaintiff and his party not being able at that time to give the security, the justice was proceeding to write a commitment, when the constable interposed and said he would be security for their appearance on the next day. They were accordingly conducted back to Marples's tavern, and remained there under custody till the next day, Tuesday. During the second night, John Kenderdine and eight or ten of his friends, came to the tavern, and insisted upon taking charge of the prisoners; some of the party behaved with great rudeness. The constable remonstrated, but they persisted, and he withdrew from the charge. On Tuesday the friends of the Jersey party arrived from Newtown, in Bucks county, and the city of Philadelphia, and they entered into security in 2000 dollars, respectively, and one security in the like sum to appear at the next court of quarter sessions, to answer the charge of kidnapping. John and Isachar Kenderdine were bound over to testify against them. The grand jury examined the witnesses for the prosecution, and returned a true bill. At the trial at Norristown, Montgomery county, before the petit jury, great excitement against Johnson and his co-defendant, prevailed. A subscription was made to employ additional counsel to aid the attorney-general in conducting the prosecution; after a long and arduous trial, the defendants were acquitted, and negro Jack was delivered up to his master, Caleb Johnson, the present plaintiff, by order of Judge Jones, one of the judges of the court of common pleas of Montgomery county.

There never was any authority in writing, either warrant or commitment, to detain the Jersey party; there never was any hearing, on oath or affirmation, nor was there any complaint made on oath or affirmation before Judge M'Neil or Justice Tompkins on Monday; the evidence was contradictory whether any complaint on oath or affirmation was made before Justice Tompkins on Tuesday.

On the present trial there was no dispute that Jack was a slave, since his restoration to his master he had manumitted him. Jack was now living near to his master, in the vicinity of Princeton, and had attended the last court as a witness for the plaintiff, when the

[Johnson v. Tompkins and others.]

trial was postponed. Caleb Johnson, the plaintiff, was a farmer of considerable wealth and unexceptionable character, it appeared also that the defendants were men of moderate property, also of a fair character, and highly respectable members of the society of friends.

Mr J. Randall and Mr Kittera, for the plaintiff.

Jack is admitted to have been the slave of the plaintiff, who had by the constitution of the United States, and the act of February 1793, 1 Story 285, a perfect right to take his slave within this state, at any time he pleased, to use any force necessary for the purpose, to detain him a reasonable time before taking him to any magistrate, and to select any one before he would bring him, 2 Dall. 225; Hill v. Lowe, 4 Wash. 328, they also referred to a manuscript opinion of Judge Peters in that case.

This right of the master cannot be restrained or qualified by state laws, or be obstructed by state officers, nor is the right of property to be decided by the laws of the state to which the slave absconds.

In New Jersey every coloured person is presumed to be a slave, till the contrary is proved. 2 Halst. 253.

It is no justification of defendants, that the slave was arrested on Sunday, the master had a right to do it on that day, on the same principle that bail may take his principal on Sunday. 6 Mod. 231. The acts done by the defendants were in law an arrest and imprisonment, though the person of the plaintiff might not have been touched, 2 Saund. Pl. & Ev. 520; Ry. & M. 321; 21 C. L. 449, and every person present and consenting to what was done is equally liable with those who did the act.

If a felony had been committed, the plaintiff was liable to arrest without a warrant, but the party arresting does it at his peril, and if the party arrested is not guilty, he may recover damages; here there is no pretence of guilt, and the case is not within the act of 1820, which will be confined to force or fraud used on a freeman, according to the opinion of the supreme court on a similar law. Resp. v. Richards, 2 Dall. 226.

Mr Rawle, Jr. and Mr Sergeant, for the defendant.

As plaintiff claims his rights by law, he must obey it, and a master has no right to pursue his fugitive slave into the house of another, Lane v. Mason, before Judge Peters; nor to arrest him on Sunday, as no writ or process can be served on that day, Purd. 850; and when

[Johnson v. Tompkins and others.]

he arrests him, he is bound to take him before a magistrate, in order to procure a warrant for his removal, pursuant to the act of congress.

No force can be used but in taking the slave to the magistrate, or removing him out of the state after a warrant is obtained, and if the master does not follow the act of congress, he becomes answerable to the laws of the state punishing kidnapping, which, by the act of 1820, consists in taking any coloured person out of the state by force, unless done according to the provisions of that law. *Purd.* 652.

By the law of Pennsylvania, every person, black or white, is presumed to be free till the contrary is proved.

The plaintiff brought himself within the penal provisions of the act of 1820, if he did not immediately, on the arrest of Jack, prove his property in him, and procure a warrant from a judge or magistrate; the offence is a felony, and he became liable to an arrest by any person who saw him in the act of removing Jack from the state without a warrant. A warrant may issue on reasonable suspicion of a felony being committed. 1 *Sel. N. P.* 126; 6 *Bac.* 572, 573, 574; *Moore* 408. The constable had a right to detain the plaintiff for examination, 1 *Hale* 585, 586, and any bystander who saw the act committed had a right to demand the authority by which an act which was *prima facie* a felony by the law of the state, was committed.

The defendants did no more than they had a right to do, the person of the plaintiff was not violated, none of them touched him, and words alone are neither an arrest, an assault, or imprisonment; there must be a touch, or physical restraint. *Bull's N. P.* 22; 2 *Selw.* 113; *Salk.* 79; 6 *Mod.* 173; 4 *J. R.* 32; 5 *B. & P.* 211. This action cannot be supported against Mr Tompkins, who is a justice of the peace, and cannot be sued for any act done by virtue of his office, unless the notice prescribed by the act of assembly is previously given, which has not been done. *Purd.* 492; 1 *Smith* 364, 365.

BALDWIN, J. charged the jury.

The facts of this case are not complicated, nor is there much contest about those which are material to its decision; the questions of law however are of the last importance, involving the rights of property and the personal rights of the citizens of this and other states, to an extent which calls for a plain expression of our opinion, in order to have the law finally settled by the supreme court, on the interesting subjects now before us.

[Johnson v. Tompkins and others.]

On a question of slavery or freedom, the right is to be established by the same rules of evidence as in other contests about the right to property, 7 Cranch 295, quiet and undisturbed possession is evidence of ownership, and cannot be disturbed by any one who has not the right of property, and the burthen of its proof rests on the one who is not in possession. In this case the proof of Jack being the slave of the plaintiff, is full, clear, and uncontradicted; Jack admitted that he was a slave till thirty years of age, when he alleges he was entitled to his freedom by the will of a former master; this assertion is wholly unsupported by proof, and contradicted by the will in evidence before you. Were this a trial between Jack and the plaintiff on a question of freedom, there could be no doubt on the evidence before you, a bill of sale is not necessary to show the property to be in the plaintiff, it may be proved by parol evidence, or inferred from long possession. 1 Dall. 169.

The ownership of Jack being thus clearly made out, he must be deemed to be the property of Mr Johnson, over which he has the same control as over his land or his goods. It is not permitted to you or us to indulge our feelings of abstract right on these subjects; the law of the land recognises the right of one man to hold another in bondage, and that right must be protected from violation, although its existence is abhorrent to all our ideas of natural right and justice.

As a consequence of this right of property, the owner may keep possession of his slave; if he absconds, he may retake him by pursuit into another state, and may bind or secure him in any other way, to prevent his second escape, he may arrest him by the use of as much force as is necessary to effect his reclamation; he may enter peaceably on the property or into the house of another, taking care to commit no breach of the peace against third persons. But it is no breach of the peace to use as much force or coercion towards the fugitive as suffices for his security, as without such force no slave could be re-taken, without his consent. The master may also use every art, device or stratagem to decoy the slave into his power; odious as these terms may be in their application to an unlawful act, they ought to be considered as far otherwise when used for a lawful and justifiable purpose. It is every day's practice to detect counterfeiters, and those who pass counterfeit money, by employing persons to purchase it from them; it is necessary for the purpose of public justice that such and similar means should be resorted to, or criminals would escape detection; they are neither immoral or illegal.

[Johnson v. Tompkins and others.]

This right of a master to arrest his fugitive slave, is not a solitary case in the law ; it may be exercised towards a fugitive apprentice or redemptioner, to the same extent, and is done daily without producing any excitement ; an apprentice is a servant, a slave is no more ; though his servitude is for life, the nature of it is the same as apprenticeship or by redemption, which, though terminated by time, is, during its continuance, as severe a servitude as that for life. Of the same nature is the right of a parent to the services of his minor children, which gives the custody of their persons. So where a man enters special bail for the appearance of a defendant in a civil action, he may seize his person at his pleasure, and commit him to prison, or if the principal escapes, the bail may pursue him to another state, arrest and bring him back, by the use of all necessary force and means of preventing an escape. The lawful exercise of this authority in such cases is calculated to excite no sympathy ; the law takes its course in peace, and unnoticed, yet it is the same power, and used in the same manner, as by a master over his slave. Had Jack been the apprentice of Mr Johnson, or had he been the special bail of Jack, he would have the same right to re-take him as he had by being his owner for life ; the right in each case is from the same source, the law of the land. If the enforcement of the right excites more feeling in one case than the other, it is not from the manner in which it is done, but the nature of the right which is enforced ; *property in a human being for life*. If this is unjust and oppressive, the sin is on the heads of the makers of laws which tolerate slavery, or in those who have the power, in not repealing them ; to visit it on those who have honestly acquired, and lawfully hold property, under the guarantee and protection of the laws, is the worst of all oppression, and the rankest injustice towards our fellow-men. It is the indulgence of a spirit of persecution against our neighbours, for no offence against society or its laws ; for no infringement of the rights of others, but simply for the assertion of their own in a lawful manner.

If this spirit pervades the country ; if public opinion is suffered to prostrate the laws which protect one species of property, those who lead the crusade against slavery may, at no distant day, find a new one directed against their lands, their stores and their debts ; if a master cannot retain the custody of his slave, apprentice, or redemptioner, a parent must give up the guardianship of his children, bail have no hold on their principal, the creditor cannot arrest his debtor

[Johnson v. Tompkins and others.]

by lawful means, and he who keeps the rightful owner of lands or chattels out of possession, will be protected in his trespasses.

When the law ceases to be the test of right and remedy; when individuals undertake to be its administrators by rules of their own adoption, the bands of society are broken as effectually by the severance of one link from the chain of justice, which binds man to the laws, as if the whole was dissolved. The more specious and seductive the pretexts are under which the law is violated, the greater ought to be the vigilance of courts and juries in their detection; public opinion is a security against acts of open and avowed infringements of acknowledged rights; from such combinations there is no danger; they will fall by their own violence, as the blast expends its force by its own fury. The only permanent danger is in the indulgence of the humane and benevolent feelings of our nature, at what we feel to be acts of oppression towards human beings endowed with the same qualities and attributes as ourselves, and brought into being by the same power which created us all; without reflecting that in suffering these feelings to come into action against rights secured by the laws, we forget the first duty of citizens of a government of laws; obedience to its ordinances.

The opinion of Judge Washington, in *Hill v. Law*, meets our entire concurrence. "That if a man should honestly believe that the person claimed as a fugitive did not in fact owe service to the claimant, he could not in his defence allege ignorance of the law, and that such matters were unfit for the inquiry of the jury. That it was sufficient to bring the defendant within the provisions of the law, if having notice either by the verbal declarations of those who had the fugitive in custody, or were attempting to seize him; or by circumstances brought home to the defendant, that the person arrested was a fugitive or was arrested as such." 4 Wash. 329. The case must be decided by the facts in evidence, and will not be influenced by the defendant's belief or knowledge of them in any other way than in mitigation of damages, if you are satisfied that they were really ignorant of Jack's situation, and they believed him free.

Their interference was purely voluntary. The first inquiry then is, was it justifiable?

The slave was arrested on Sunday, it is true, but no law prohibits a man from protecting or reclaiming his property on that day, 5 Serg. & Rawle 301. Working on Sunday is no breach of the peace, 1 Serg. & Rawle 350, when done without noise or disorder. A

[Johnson v. Tompkins and others.]

justice of the peace has no right to enter on the land of another on Sunday for the purpose of obtaining evidence of a breach of the Sabbath against the will of another. He ought to summon the offenders the next day, and proceed against them in the usual manner, *Id.* 351. If the service of process on Sunday was illegal, except for a breach of the peace or felony, the defendants could not arrest or detain the Jersey party without process or legal authority for any other cause.

The slave, it seems, was seized in the twilight or night, but that did not justify the interference of the defendant to rescue him, or obstruct the plaintiff in removing him; the putting of irons upon him is of itself no justification of the infliction of any violence upon the plaintiff. If it was an act of unnecessary severity, it would be a circumstance for which you would make a proper allowance in assessing damages, as one which would mitigate the conduct of the defendants, by the excitement which it would be apt to produce.

If you believe the evidence, the plaintiff has established his right to arrest Jack; proof of his slavery and owing service to him absolves him from the risk he ran in seizing him; but the same fact which absolves him makes the defendants liable, if they have done any act not warranted by law by which the plaintiff has suffered an injury. It is contended that they had a right to arrest the plaintiff and his party when in the act of committing, attempting to commit a felony, or doing an act which might amount to a felony, and prevent its commission thereby; and such is undoubtedly the law.

There may be an arrest without warrant by a public officer, or a private person, who sees another commit a felony; or if a felony is known to have been committed, the person committing it may be pursued and arrested; and when there is only probable cause of suspicion a private person may, without warrant, at his peril make an arrest. 6 Binney 318, 319.

A constable may arrest without warrant for a breach of the peace in his presence, and commit the offender to jail for safe keeping, so may a private person for felony, or on an affray which has taken place in his presence, or where an arrest is made on suspicion, 8 Serg. & Rawle 49, 50. Such is the law of Pennsylvania, which secures the peace of the public, but the law does not stop here; it does not leave the citizen at the mercy of peace officers or individuals; they make the arrest at their peril; in the emphatic language of the late Chief Justice Tilghman; "I say at his peril, for nothing short of

[Johnson v. Tompkins and others.]

proving the felony will justify the arrest," 6 Binney 319 ; and the present chief justice, in declaring the right of the constable to arrest in such case says ; "there is no danger to the liberty of the citizen in this, for if the arrest and detention be improper, the prisoner can have instant redress by the writ of habeas corpus, and the constable may be punished by indictment, or subject to damages in an action of trespass." 8 Serg. & Rawle 50.

The law is the same as to the plaintiff; "at the common law a master had a right to take up his runaway servant, and for this, as for any other lawful purpose, might enter peaceably into any house, unless forbidden by the owner. Any person with authority from the master might do the same. The domestic authority of masters and parents must be supported, as essential to the peace of society, and contributing to a due subordination to the authority of government, Addison's Rep. 325, the acts of assembly do not give, but only enforce this right.

If the person arrested is not a servant or slave, or the person making the arrest has not the authority of the master for so doing, he is in either case liable for the illegal arrest.

You will therefore consider the law as settled, that where an arrest is made without a warrant from a proper officer, the person making the arrest is liable in damages to the party arrested, if he is innocent of the offence with which he is charged, and for which he has been arrested, though the person arresting may have honestly believed the other guilty ; though there was ground for suspicion, or probable cause for the arrest, he is liable to an action for the arrest, unless actual guilt appears. These circumstances will weigh with a jury in reducing damages, but as the arrest turns out to be illegal, it cannot be justified ; the reason is obvious, though the public peace requires the speedy apprehension of offenders against the law, it does not authorize the imprisonment of the innocent ; from this rule there is no exception, where the arrest is without warrant. If a lawful warrant is directed to an officer, or a private person, and he does not exceed or abuse the authority it confers, he is liable to no action, though the person who is described in the warrant, and arrested, is wholly innocent of the offence charged ; this is also an incontestable principle of the law ; so that while innocent men are protected in their liberty against arrests, by officers or private persons, on their own authority, the latter are equally protected in the execution of lawful process. In the one case they act at the peril of

[Johnson v. Tompkins and others.]

the party arrested being guilty, in the other the law absolves them from any responsibility. The law is the same if a constable seizes a person as a runaway servant, by order of one claiming to be his master, he is liable to an action if the person arrested is not his servant; but if he apprehends him on a warrant from a magistrate no action lies against him.

You will then apply these rules of law to the case before you, and inquire whether the plaintiff, and those acting under his authority, committed any felony or breach of peace, in seizing, securing, and carrying Jack to the house of Marples, in Hatborough. The record of their acquittal is conclusive evidence of their innocence of the offences charged in the indictment preferred against them at Norristown, either jointly or severally; you are bound to consider them each and every one as not guilty of any of the matters charged as a felony or offence under the act of assembly of March 1820, or the common law. Independently of this acquittal, if Jack was the slave of the plaintiff, neither he nor the others of his party could be guilty of kidnapping, under that or any other law of the state. So long since as 1795, the supreme court unanimously decided that it was no offence, under the seventh section of the act of March 1788, for a master to arrest his slave forcibly, and carry him out of the state; that the law was intended, and only applied, to carrying a freeman out of the state into bondage. 2 Dall. 226.

The law of 1820, section one, on which the plaintiff was prosecuted, was copied from the law of 1788, and must receive the same construction; its re-enaction, with the full knowledge which the legislature must be presumed to have had of its judicial exposition by the supreme court, which had remained unquestioned for twenty-five years, without any alteration, is to be considered as not intended to alter, and as not altering the law on the subject. The rule thus established by the legislature and courts of the state, is the rule for our decision, both by the thirty-fourth section of the judiciary act, and the uniform decisions of the supreme court of the United States; it need not, therefore, be regarded with any jealousy, as opposed to the laws, policy or feelings of the state, or the people thereof; neither do we think it necessary to add any reasons to those given by Chief Justice M'Kean, 2 Dall. 226, in the charge of the court to the jury. "The severity of the punishment to be inflicted in case of a conviction (a punishment the same, in its nature, as is inflicted for the most infamous crimes), ought certainly to induce the

[Johnson v. Tompkins and others.]

jury to deliberate well, before they determine, that the act committed by the defendant constitutes the offence, which is the object of the law. The extravagant operation and extent of the doctrine on which the prosecution is maintained, ought also to awaken the most serious attention, for it has been contended, in effect, that should a traveller bring into this state a negro or mulatto slave; nay, should a tradesman of Pennsylvania have a negro or mulatto indented servant, who being sent on an errand, loiters away his time in tippling, in debauchery, the master cannot forcibly seize and carry the delinquent to another place, either beyond or within the jurisdiction of Pennsylvania, without incurring the penalties of the act of assembly: if it is intended afterwards to keep and detain the negro or mulatto as a slave or servant. Is it rational to conceive, that any legislative body would have destined for such an act so grievous a punishment? Again: It has been alleged that the law has made no difference, and therefore, that the court can make none, between a freeman and a slave, provided the injured party is a negro or mulatto. But is it possible that any individual of common sense, that any assemblage of enlightened men should so confound the nature of things, should so pervert the principle of justice, as to suppose, that it is as criminal for a master to carry off his own slave with the intent to retain him in slavery, as for a stranger to carry off a freeman, with the intent to sell him into bondage? Can these actions merit the same degree of punishment?

“It is evident however that such enormities are not imputable to the legislature of Pennsylvania. By the tenth section of the act for the gradual abolition of slavery (1 Dall. edit. 81), persons merely sojourning in this state have a right to retain their slaves for a term of six months, and the delegates in congress from other states, foreign ministers and consuls, enjoy that right as long as they continue in their public characters; the succeeding section likewise expressly provides that absconding slaves shall derive no benefit from the law, but that their masters shall have the same right and aid to demand, claim and take them away that they had before. This act of assembly, and particularly these provisions, are not repealed by the supplemental act on which the prosecution is founded. Then we find that any traveller who comes into Pennsylvania upon a temporary excursion for business or amusement, may detain his slave for six months, and the previous law (recognised by act of assembly during that term), authorizes the master to apprehend the slave, and entitles him

[Johnson v. Tompkins and others.]

to the aid of the civil police to secure and carry him away. By a regulation of this kind the policy of our own system is reconciled with a due respect to the system of other states and countries, while an opposite construction would render it impossible for any American or foreigner to pass with a slave through the territory of Pennsylvania.

“It has been said that the word slaves, or servants, which are used in the other provisions of the supplemental act, being omitted in this section, it must be inferred that the legislature intended to protect the slave or servant as well as the freeman from the outrage contemplated; but, in our opinion, that very omission shows the fallacy of such a construction, for if the legislature designed to protect freemen and not slaves, they could not in any other way more effectually manifest their meaning. In short, the evil apprehended was that of forcing a free negro or mulatto into another country and there taking advantage of his colour to sell him as a slave, and for such an offence the punishment denounced by the law would be justly inflicted.

“Upon a review of the facts, likewise, we find occasion to regret that the prosecution should have been conducted with a zeal which rarely appears in the prosecution of the highest criminal on the strongest proof. There is not, however, a title of evidence to establish the charge that the defendant seduced the negro, or that he even spoke to him in Pennsylvania, where the action of seduction must be committed to vest the jurisdiction in the court. Nor can it be fairly said that he caused the negro to be seduced, for the advice given to General Sevier was merely the advice of a friend, which could not surely merit the ignominious punishment of the law, and which was not in fact adopted, as the negro was forcibly, and not by seduction sent out of the state.

“But, upon the whole, we were unanimously of opinion, as soon as it was proved that the negro was a slave, that not only his master had a right to seize and carry him away, but that in case he absconded or resisted, it was the duty of every magistrate to employ all legitimate means of coercion in his power for securing and restoring the negro to the service of his owner, whithersoever he might be afterwards carried.”

We have laid down the law to be, that bail may arrest their principal; this, too, we have done in accordance with the decisions of the supreme court of this state. “In the relation in which the several states comprising the union stand to each other, the bail in a suit

[Johnson v. Tompkins and others.]

entered in another state, have a right to seize and take the principal in a sister state, provided it does not interfere with the interest of other persons who have arrested such principal." 2 Yeates 264.

Special bail may take up the principal when attending court, or at any time he pleases. "It has been quaintly said that the bail have their principal always on a string, and may pull the string whenever they please, and render him in their own discharge, 4 Yeates 125; S. P., 3 Yeates 37." The court refer to and adopt the law as laid down in England, in the same words, 6 Mod. 231, in which it is added they may take him even on a Sunday, "and confine him till the next day, and then render him;" it is therefore the common law of Pennsylvania as well as of England.

We have also stated the law to be that apprentices, redemptioners, slaves and servants who abscond from the service of their masters, may be apprehended wherever they may be found; this we have done not only on the authority of the courts of Pennsylvania, but of its various laws. ●

By the act of 1770, yet in force, a fugitive apprentice may be apprehended by a warrant from a justice, and committed to jail till he will consent to return to his master, or give security to answer his complaint, Purd. 42. This act was extended to redemptioners in 1820. If any person harbour him without giving notice to his master, he shall pay 20 shillings a day; Purd. 42, 43, and the apprentice to serve five days, for each day's absconding. Purd. 829.

The act of March 1780, which declared all issue of slaves born after that day to be free, unless registered according to its provisions, puts negro and mulatto servants, till twenty-eight, on the same footing as servants by indenture. 1 Dall. 839, 840, sect. 4.

The reward for taking up runaway and absconded negro and mulatto servants and slaves, and the penalties for enticing away, dealing with, or harbouring them, are also the same as in the case of servants bound for four years. 1 Dall. 841, sect. 9.

It was "provided that this act, or any thing it contained, shall not give any relief or shelter to any absconding or runaway negro or mulatto slave or servant, who has absented himself, or shall absent himself from his or her owner, master or mistress, residing in another state or country; but they shall have like right and aid to demand, claim, and take away his slave or servant as he might have had in case this act had not been made." 1 Dall. 842, sect. 11.

This section remained in force till 1826; it was therefore applica-

[Johnson v. Tompkins and others.]

ble to this case in 1822. It is all important, as evincing the spirit, policy and feeling of the state, to be utterly opposed to the *relief or sheltering* of absconding or runaway slaves or servants from other states, or considering the masters who come to reclaim them as felons. On the contrary, it expressly declares that they shall have right and aid, to demand, claim and take away his slave or servant; and in order that the meaning of this part of the law should not be misunderstood, that the benevolent objects of the legislature, as declared in the preamble, should not be perverted to purposes forbidden by the law, it puts the master on the same footing as to carrying his slave out of the states, as if the law had never been passed. This is language which cannot be misunderstood.

It is due to the character of the state that its own laws at least should be respected in courts of justice, by all who are concerned in its administration; it is our most solemn duty to enjoin it on you to take the law of the land as you see it in the statute books, and enforce it according to its provisions. Remember too that this law is that act which has been the pride of Pennsylvania, as one of the most noble and glorious emanations from the spirit of the revolution, as declared in the preamble, which has been read to you with the most touching force and eloquence.

But you must not take the spirit of the law according to the impulse which operates to rouse the feelings of counsel in the cause of their clients; look on it, examine its enactment, not only with a watchful eye, but if you please, in the plenitude of philanthropic zeal in the cause of oppressed humanity. To relieve the oppressed, rescue the free from bondage, to punish those who violate the rights of man and humanity, to protect our fellow-man from injustice, and to secure to all alike the benefit of the laws, are the imperious duties of jurors. In obedience to such dictates we call your attention to the laws for the gradual abolition of slavery in Pennsylvania.

The two first sections are the preamble.

The third declares that no child hereafter to be born shall be a servant for life or a slave. The slavery of children in consequence of the slavery of their mothers, is for ever abolished.

The fourth has been noticed.

The fifth directs slaves to be registered before the 1st of November 1780.

The seventh directs negroes to be tried for crimes and offences like other inhabitants.

[Johnson v. Tompkins and others.]

The tenth declared all unregistered slaves to be free, except the domestic slaves of members of congress, foreign ministers and consuls, and persons passing through or sojourning in the state, not resident in it, and seamen not owned in the state or employed in ships belonging to the inhabitants of the state. This is the substance of the abolition act.

The eleventh excepts fugitives, as has been noticed.

This law was explained and amended by the act of March 1788, which declared all slaves brought into the state by persons residing or intending to reside in it, to be immediately free; prohibits the taking of the slave out of the state with intent to change his place of residence, or selling him for such purposes, directs the registry of the children of slaves, and punishes kidnapping.

In the spirit of these laws the legislature passed "An act to incorporate a society by the name of the Pennsylvania society for promoting the abolition of slavery, and for the relief of free negroes unlawfully held in bondage, and for improving the condition of the African race." No society was ever founded for nobler objects, or more deserving of public encouragement and approbation; but it was no part of the design or objects of this benevolent society, to protect or rescue runaway slaves from the claims of their masters. It was provided in their charter that their by-laws, rules, orders and regulations enacted, or to be enacted, be reasonable in themselves, and not contradictory to the constitution and laws of the state. Acts of Assembly 218, 223, A. D. 1789.

So far as has come to our knowledge or information, this society has acted on the philanthropic principles of its institution, and none other, never interfering with the rights of property, as secured by the laws, they have not infringed the condition of their charter, but pursued their legitimate objects with untiring zeal. If they have been perverted by any honorary member, like Mr Ellis, by contributing money to employ counsel to prosecute a master for lawfully seizing and taking away his runaway slave, we are well convinced that it has been equally repugnant to the feelings and practice of the members of the society, as it would be to their charter.

These laws remained unchanged till 1820, when an act was passed on the subject, the provisions of which need not be particularly recited; the proviso in the second section is, however, important; "Provided always, that nothing herein contained shall be construed as a repeal or alteration of any part of an act of assembly, passed 1st

[Johnson v. Tompkins and others.]

March 1780; or of any part of the act of 29th March 1788, except the seventh section, which is repealed."

This is the section which prescribed the punishment for kidnapping, and was copied, except as to the punishment, into the first section of the law of 1820.

By the law of 1788, the punishment was a fine of 100 pounds, and confinement at hard labour not less than six, or exceeding twelve months, until the costs be paid. 2 Dall. 589.

By the law of 1820, the fine was not less than 500 dollars, or more than 2000 dollars, to be deemed guilty of a felony and sentenced to undergo a servitude not less than seven or more than twenty-one years, confined, kept to hard labour, fed and clothed as is directed by the penal laws of this commonwealth, for persons convicted of robbery. Purd. 653.

The punishment of the first offence of robbery is a servitude of not less than one or more than seven years, and for a second offence not exceeding twelve years. Act of 1829, Purd. 821.

On the first conviction of murder in the second degree, the punishment is servitude for not less than four or more than twelve years; for the second offence, confinement for life. Act of 1829, Purd. 648.

The penal laws of Pennsylvania are just, mild and humane; her penal code is admired not only in this, but in all the civilized nations of the world. Here punishment is graduated in proportion to the enormity of the offence, and cruel punishments are expressly forbidden by the constitution, as well as excessive fines, Art. 9, section thirteen, and by the eighth amendment to the constitution of the United States.

That offence must be dark and black indeed, which is in the view of the legislature so much more heinous than highway robbery or wilful murder. Can you believe that it was their intention to subject the man who arrested his own fugitive slave by force, with the intention of conveying him to his home in another state, to a punishment greater in a threefold degree than the most aggravated highway robbery, and for a time exceeding by nine years the utmost term of servitude which a court could, for the first offence, inflict on the vilest murderer, whose forfeited life may have been spared by the mistaken humanity of a jury?

Would a wise, just, or humane body of men pass a law which would put on a level the man who reclaimed his own property by

[Johnson v. Tompkins and others.]

lawful means, and the wretch who would drag a freeman into bondage, and arrest as felons of equal grade, a respectable farmer from an adjoining state, with the sordid habitual trafficker in human flesh, the lawful taking of one's own property, with the stealing of a human being ?

When the punishment of kidnapping was only a fine of 100 pounds, and the extent of confinement only one year, the supreme court declared that such enormities were not imputable to the legislature of Pennsylvania ; we should do them great injustice not to rescue them a second time from the imputation, when the fine is greatly increased, and the servitude extended not only to seven, or twenty-one times the extent, but directed to be as a felon, and highway robber ; law, justice and humanity combine to repel an idea so dreadful. The great and benevolent act for the gradual abolition of slavery did not abolish the distinction between bond and free negroes and mulattoes, the freeman and the absconding slave, the master who brought his slave here to reside, and the master who came here in pursuit of one who absconded from him ; and when you are invoked to respect the legislation and spirit of the state, you will remember that this consists in obedience to its laws, which expressly declare ; that they give no relief or shelter to runaway slaves from other states ; that their master shall have a like right and aid to demand, claim, and take them away, as if the law for the abolition of slavery had never been passed ; and remember too that this law is expressly declared not to be changed or repealed by the law of 1820, under colour of which the defendants claim the right to consider the plaintiff as a felon for doing the very act, for which he had a right to aid, help and assistance by the abolition act, and by which the runaway slave was denied relief or shelter within the state.

While the abolition act put free blacks on the footing of free white men, and abolished slavery for life, as to those thereafter born, it did not otherwise interfere with those born before, or slaves excepted from the operation of the law ; they were then, and yet are, considered as property ; slavery yet exists in Pennsylvania, and the rights of the owners are now the same as before the abolition act ; though their number is small, their condition is unchanged. The rights of the owners of fugitive slaves to take them to their homes in another state, were as perfect in 1822, as they were before the revolution ; these rights are defined by the abolition act in the most plain, expli-

[Johnson v. Tompkins and others.]

cit terms, without any condition imposed on their exercise. The right was complete and perfect, if there existed between the person seizing and the person seized, the relation of owner and slave, or master and servant, the master or owner might take away his slave or servants to another state or country where he resided, without the consent of the negro, the person with whom he lived, the neighbourhood, or the order or warrant of any magistrate. The law was his warrant, his authority, in the execution of which the master had a right to aid, and it is by this law that the rights of the parties in this suit must be tested in this case. If Jack, therefore, was the slave or servant of Mr Johnson, the act of seizure was lawful ; and if the defendants, or any of them, beat, assaulted, arrested or imprisoned him, or any one acting by his authority, the act was illegal without the lawful warrant or authority of any officer of the law.

Had the defendants any such authority ?

In inquiring into the laws of Pennsylvania, on the subject of the rights and liberties of its citizens, and those of other states, a court who is to decide and instruct a jury upon them according to the law of the land, is not at liberty to overlook that law which is supreme.

The eighth section of the ninth article of the bill of rights in the constitution of Pennsylvania declares, " that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures ; and that no warrant to search any place or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

The fourth amendment to the constitution of the United States declares, " that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

The supreme court of this state have decided that a warrant for forgery issued by a president of the court of common pleas, on the ground that it appeared to the judge from common report that there was strong reason to suspect the party charged to be guilty, and that he was likely to depart and retreat to parts unknown, before the witnesses could be summoned to appear before the judge to enable him to issue a warrant on oath, was illegal on the face of it, and a

[Johnson v. Tompkins and others.]

constable not bound to execute it. 3 Binn. 43, 44 ; Purd. The first order issued by Judge M'Neil was to John Kenderdine, without oath, affirmation or any probable cause whatever ; on the mere statement made by him, the particulars of which the judge has been unable to recollect, so as to even state them at the trial for our information ; if instead of a verbal direction to bring the Jersey party before him, he had issued a warrant for the purpose, the legal result would have been the same.

Being in direct violation of both constitutions, utterly wanting every requisite prescribed, this order was, as every warrant or written authority from the judge would have been, utterly illegal, null and void, to all intents and purposes ; affording no justification to Kenderdine to execute it, or to any one in assisting him, any act done under such an order is as illegal as if none had been given, and for any injury done to the person or property of the plaintiff, or the others of his party, an action would lie as well against the judge as all those who acted in pursuance of that order, whether it issued to bring the parties before the judge to prove the plaintiff's property in Jack, or to answer for a crime or any offence against the laws.

The liberties of our citizens do not depend on such a tenure as an admission of the legality of this order would imply ; nor are constitutional provisions for their protection, to be deemed such solemn mockeries as we should make them by justifying the conduct of the defendants in pursuance of it.

You will therefore consider every act done by them, or any of them, every assault or offer of force, arrest, confinement, or restraint of the personal liberty of any of the Jersey party, under or by virtue of the order of Judge M'Neil, as wholly without authority of the law, and in direct violation of its most solemn provisions.

We now come to the second order of the judge.

The judge tells us that he took it for granted, from seeing the justice and constable in company, that the Jersey party were in their legal custody, and in consequence of such belief, he suggested the propriety of committing the negro to the county jail, and binding over the other party to prove their property, if they had any. If you believe the statement of the judge, there can be no difficulty in deciding on the merits of this part of the transaction, taking it in either way. As a compulsory proceeding on the Jersey party to compel them to prove the property in Jack, it was without any authority of law as utterly void as the former order. If it was to detain,

[Johnson v. Tompkins and others.]

confine or arrest them on a criminal accusation, it was unconstitutional, for the want of an oath and probable cause ; there is no evidence of even an accusation made against them in any specific shape, or charging any definite offence ; the judge does not state that any application was made for any process to be issued by him ; if he is credited, he gave no order, but only suggested, advised or recommended the course he pointed out.

You will judge, from the whole evidence, what was the nature and object of the proceeding before the judge, and of what he did advise or direct. By referring to that part of the book of justice Tompkins which has been read, it seems to have been well understood by him at least, " that it was thought advisable to commit the said Jack to jail for safe-keeping, until the said Caleb Johnson should have an opportunity to prove his property." The recognizance of Mr John and Justinian Kenderdine, taken on their return from the judge's on Sunday night, shows their understanding of the matter ; the condition was to deliver the said Caleb Johnson, whenever *his claim is completely established*, or deliver him up at the next court of quarter sessions of Montgomery county, &c. This was the only act of Mr Tompkins which appears to have been done officially by him that night, of which there is any evidence, unless the setting Jack free under the recognizance was intended to be an official act. As the advice or direction of Judge M'Neil was not pursued by the commitment of Jack, the condition of the recognizance was one which the judge or justice had no power or right to impose ; the proceeding at the judge's was wholly illegal, and the detention of the Jersey party that night lawless and unjustifiable.

We now come to the proceedings before the justice on Monday morning. According to the account of Mr Roney, the constable, no witnesses were examined, no oath or affirmation was administered by the justice, or any question put to the Jersey party, except whether they had bail ; they said they could procure bail if they had an opportunity ; the justice said he must commit them, and took up his pen to write, the constable then said he would be forthcoming for their appearance next morning, and they returned to the Billet. Skillman gave the same account of this part of the transaction of the justice's.

If you believe this statement, it is the worst part of the transaction ; with ample time to proceed deliberately in due form of law, with no crowd or confusion to prevent a full and patient examination,

[Johnson v. Tompkins and others.]

there was no excuse for not strictly pursuing every step required by the law and constitution. The question of Jack's slavery had assumed a definite shape by his admission before the judge in the presence of Justice Tompkins and the rest of the party, that he was born a slave, and that he had lived with Mr Johnson as such ; he admitted his slavery till he was thirty, when he alleged he was free by the will of Judge Berrian, of New Jersey. The production of this paper then was necessary to make out the truth of Jack's assertion, but it does not appear to have been called or sent for, nor was Jack called on to verify his statement on oath, though he was a competent witness against Mr Johnson, if he was a free man or only a servant for years.

There could not be probable cause for the prosecution, unless there was at least some legal evidence of his freedom made out by oath or affirmation. Jack's assertion, not under oath or affirmation, was not even the shadow of probable cause to justify the justice in committing, arresting, detaining or issuing a warrant for the apprehension of the Jersey party, or any of them.

Does the evidence of Robert Tompkins change the result ?

It is your exclusive province to decide on his credibility, you may believe or disbelieve his evidence, as you may think proper ; but in giving you our opinion as to its legal effect, we must consider it as true.

He says that John and Sarah Kenderdine were examined before the justice, but does not state what evidence was given, and no paper or book containing it was given in evidence ; this removes one constitutional objection ; but it leaves the proceedings open to another fatal one, the want of probable cause on which to issue a warrant or order of arrest. This witness does not state whether any of the other party were present or not. This is an all important matter. The ninth section of the ninth article of the state constitution provides, " that in all criminal prosecutions the accused hath a right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and to meet the witnesses face to face.

The sixth amendment to the constitution of the United States provides, " that the accused shall enjoy the right to be informed of the nature and cause of the accusation against him, and to be confronted with the witnesses."

It is therefore incumbent on the defendants to satisfy you that the

[Johnson v. Tompkins and others.]

parties accused before the justice, were present on the examination of the witnesses against them; if it took place before they were brought before him, and was not read to them or information given to them of its substance; or if it was had after they left the office, or done at any time, as a colour or cover for the proceedings which took place, without the presence or knowledge of the accused, it was not only utterly lawless, but aggravated by being done under the pretence of conformity to the provisions of the constitution. 4 Cr. 124.

As to all the proceedings then of the defendants which took place, either for the purpose of taking the Jersey party before the justice or judge to prove the property of the plaintiff or to establish a charge of kidnapping; we instruct you, without hesitation, that they were without any warrant or authority of law, wholly unqualified and illegal.

We will now inquire whether there was any lawful cause to arrest on any other ground.

The first section of the bill of rights in the constitution of Pennsylvania declares, "that all men have the inherent and indefeasible right of enjoying and defending life and liberty, of acquiring, possessing and protecting property," "that no man can be deprived of his liberty or property but by the judgment of his peers, or the law of the land." Sect. 9.

That the right of citizens to bear arms in defence of themselves and the state, shall not be questioned. Sect. 21.

The second section of the fourth article of the constitution of the United States, declares, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The tenth section of the first article prohibits any state from passing any law "which impairs the obligation of a contract."

The second amendment provides, "that the right of the people to keep and bear arms shall not be infringed."

The sixth, "that no man shall be deprived of liberty or property, without due process of law."

In addition to these rights, Mr Johnson had one other important one, to which we invite your special attention, and a comparison of the right given and duty enjoined by the constitution of the United States with the eleventh section of the abolition act of 1780.

"No person held to serve or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation, be discharged from such service or labour, but shall be

[Johnson v. Tompkins and others.]

delivered up on claim of the party, to whom such labour or service shall be due." Const. U. S., art. 4, sect. 2, clause 3.

Pursuant to this provision of the constitution, the act of congress of the 12th February 1793, was passed, not to restrain the rights of the master, but to give him the aid of a law to enforce them. This law has been read to you, together with the opinion of our respected predecessors, in the case of Hill v. Law, to which we give our entire assent, so far as it affirms the unqualified right of the master to seize, secure and remove his fugitive slave. "To carry into effect the constitutional provisions on this subject, the act of congress of February 12th, 1793, was enacted. This act empowers the person to whom a fugitive from labour or service is due, his agent or attorney 'to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States residing within the state, or before any magistrate of a county, city, &c. wherein such seizure was made, and on proof of owing service to the claimant, *either by affidavit or other evidence taken before a judge or magistrate of the state from which the fugitive escaped*, the judge or magistrate of the state in which he or she is arrested shall give a certificate thereof to the claimant, his agent or attorney, which shall be a sufficient warrant for removing such fugitive.'

"By this it clearly appears that the claimant, his agent or attorney, has the authority of this law to seize and arrest without warrant or other legal process, the fugitive he claims, and *that* without being accompanied by any civil officer, though it would be prudent to have such officer to keep the peace. Whilst thus seized and arrested, the fugitive is as much in custody of the claimant, his agent or attorney, as he would be in that of a sheriff or other officer of justice, having legal process to seize and arrest, who may use any place proper, in his opinion, for temporary and safe custody." Do you perceive in this any thing discordant with the feelings, the spirit, the policy, or the legislation of Pennsylvania, as manifested in the abolition act, or the one passed to amend and explain it? Do these constitutional and legal provisions give any right to the plaintiff, or enjoin any duty on others, which are not the fundamental principles of her own laws, as acted on and enforced in her own courts, as of paramount and supreme authority? If you have any doubt, here is the opinion of one of the most humane and benevolent judges who ever presided in any court, the late Chief Justice Tilghman, in deli-

[Johnson v. Tompkins and others.]

vering the opinion of the supreme court of this state. *Wright v. Deacon*, 5 Serg. & Rawle 63.

“Whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to have become parties to a constitution, under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured. This constitution has been adopted by the free consent of the citizens of Pennsylvania, and it is the duty of every man, whatever may be his office or station, to give it a fair and candid construction.” After referring to the constitution, he observes; “here is the principle—the fugitive is to be delivered upon *claim* of his master.” But it required a law to regulate the manner in which this principle should be reduced to practice. It was necessary to establish some mode in which the claim should be made, and the fugitive be delivered up. He then recites the act of congress, and continues; “it plainly appears from the whole sense and tenor of the constitution and act of congress, that the fugitive was to be delivered up on a summary proceeding, without the delay of a formal trial in a court of common law. But if he had really a right to freedom, that right was not impaired by this proceeding—he was placed just in the situation in which he stood before he fled, and might prosecute his right in the state to which he belonged.”

This is in the spirit of the law, policy and feeling of Pennsylvania, as declared by the supreme court, and if the acts and proceedings of inferior courts and judges, in opposition to the rights of the owners of fugitive slaves are quashed as illegal, of what nature must be the lawless conduct of individuals, who, by an assumed authority, undertake to obstruct the execution of the supreme law of the land? The supreme court declares that the constitution of the United States would never have been formed or assented to by the southern states, without some provision for securing their property in slaves. Look at the first article, and you will see that slaves are not only property as chattels, but political property, which confers the highest and most sacred political rights of the states, on the inviolability of which the very existence of this government depends.

The apportionment among the several states comprising this union, of their representatives in congress.

The apportionment of direct taxes among the several states.

The number of electoral votes for president and vice president, to which they shall respectively be entitled.

[Johnson v. Tompkins and others.]

. The basis of these rights is, "according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, not taxed, *three-fifths of all other persons.*" So that for all these great objects, five slaves are, in federal numbers, equal to three freemen. You thus see that in protecting the rights of a master in the property of a slave, the constitution guarantees the highest rights of the respective states, of which each has a right to avail itself, and which each enjoys in proportion to the number of slaves within its boundaries.

This was a concession to the southern states; but it was not without its equivalent to the other states, especially the small ones—the basis of representation in the senate of the United States was perfect equality, each being entitled to two senators—Delaware had the same weight in the senate as Virginia.

Thus you see that the foundations of the government are laid, and rest on the rights of property in slaves—the whole structure must fall by disturbing the corner stones—if federal numbers cease to be respected or held sacred in questions of property or government, the rights of the states must disappear, and the government and union dissolve by the prostration of its laws before the usurped authority of individuals.(a)

We shall pursue this subject no further, in its bearing on the political rights of the states composing the union—in recalling your attention to these rights, which are the subject of this controversy, we declare to you as the law of the case, that they are inherent and unalienable—so recognised by all our fundamental laws.

The constitution of the state or union is not the source of these rights, or the others to which we have referred you, they existed in their plenitude before any constitutions, which do not create but pro-

(a) In addition to these provisions of the constitution there is another, which is deserving of the most serious notice.

In the fifth article, in relation to amendments of the constitution, is the following clause: "*and that no state shall, without its consent, be deprived of its equal suffrage in the senate.*" If the small states should refuse to surrender this right, and the constitution be so amended as to abrogate slave representation and federal numbers, no hope could be indulged that the union could survive the event. The rights of the states within which slavery exists, and the rights of the small states must be preserved or surrendered together—a separation must be fatal to "a federal government of the states."

[Johnson v. Tompkins and others.]

tect and secure them against any violation by the legislatures or courts, in making, expounding or administering laws.

The nature of this case, its history, and the course of the argument, call on us to declare explicitly what is the effect of a constitutional protection or guarantee of any right, or the injunction of any duty. The twenty-sixth section of the bill of rights in the constitution of Pennsylvania, is in these words; "to guard against transgressions of the high powers we have delegated, we declare [we the people of Pennsylvania], that every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate." A higher power declares this constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme laws of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding" Const. U. S., art. 6, clause 2.

An amendment of the constitution is of still higher authority, for it has the effect of controlling and repealing the express provisions of the constitution authorizing a power to be exercised, by a declaration that it shall not be construed to give such power. 3 Dall. 382.

We have stated to you the various provisions of the constitution of the United States and its amendments, as well as that of this state; you see their authority and obligation to be supreme over any laws or regulations which are repugnant to them, or which violate, infringe or impair any right thereby secured; the conclusions which result are too obvious to be more than stated.

Jack was the property of the plaintiff, who had a right to possess and protect his slave or servant, whom he had a right to seize and take away to his residence in New Jersey by force, if force was necessary, he had a right to secure him from escape, or rescue by any means not cruel or wantonly severe—he had a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either; he had a right to come into the state and take Jack on Sunday, the act of taking him up and conveying him to the Billet was no breach of the peace, if not done by noise and disorder, occasioned by himself or his party—and their peaceable entry into the house of Mrs Kenderdine was lawful and justifiable, for this purpose in doing these acts they were supported by laws which no human authority could shake or question.

The power of the state was incompetent to impair the obligation

[Johnson v. Tompkins and others.]

of the contract of purchase from Rowley and Berrian, or to discharge Jack from the service of his master; he could not be impeded in the prosecution of his lawful pursuit, or restrained of his liberty, without the commission of an offence and process of law.

Did they commit any breach of the peace?

Joseph Kenderdine proves he was in the house when they entered and took Jack, he heard no noise, and did not see them enter—he informed his uncle of what had happened, came with him and his aunt to the wagon, but does not recollect what was said.

Sarah Rakestraw testifies she heard Isachar ask them to prove their property, to which they replied, to stand off, and if he resisted they would blow him through—if this witness is credited, it shows the use of language rude and rough; but it did not amount to a breach of the peace without an offer to use an offensive weapon, or proof of some act done. Had such offer been made when Mr Kenderdine was doing any act which interfered with their rights, they would have been justified in using as much force as was necessary to enable them to proceed in their lawful business—his demand of proof of property was unauthorized, if the law gave him this right he would also have the right to judge of its sufficiency; but he was acting in his own wrong in making the demand, and they were under no obligation, legal or moral, to exhibit their papers, and submit to an examination by him in the highway. A request, at a proper time and place, and under circumstances where there would be any probability of a candid and impartial attention to legal evidence, respect for the rights of property, or the laws of the land, would, if refused rudely, have indicated a disposition on the part of the Jerseymen extremely reprehensible, and put their refusal on a very different footing from that in which it appears by the evidence of Miss Rakestraw; though even in such case they would not have been compelled by law to show their property or authority, yet rude conduct or language would have tended much to have palliated any excitement or violence which followed a refusal to accede to a proper request. On this subject there is much weight in the remark of the defendant's counsel, that there is a social law, a law of decent respect for the opinions of others, which ought not to be overlooked in the assertion of right—but it is most certainly a gross violation of this social law, to rudely demand as a right that which ought to be conceded only to courtesy of manner and propriety of time, place and circumstance.

The next act of the Jersey party which is complained of, is the

[Johnson v. Tompkins and others.]

threat to blow out the brains of Isachar Kenderdine, when he either had seized, or was about to seize one of their horses by the head, for the purpose of stopping them in the road, near the meetinghouse. At this time there was a crowd of some twenty or thirty about the wagon, and shortly after the plaintiff was struck in the head with a stone.

Under such circumstances, a demand to prove property or to stop, was most unseasonable and improper, any attempt to stop them was unlawful, and would have justified the repelling such an attempt by as much force, and with such weapons as would be necessary to their safe passage to the Billet; what was said or done by them was no breach of the peace, or other offence, which in any manner justified their arrest or detention. 5 Serg. & Rawle 301.

The next inquiry is whether the plaintiff has been assaulted, beat, or imprisoned by the defendants, or either of them, and by whom. An assault is an offer to strike, beat, or commit an act of violence on the person of another, without actually doing it, or touching his person.

A battery is the touching or commission of any actual violence to the person of another in a rude or angry manner.

Imprisonment is any restraint of the personal liberty of another; any prevention of his movements from place to place, or his free action according to his own pleasure and will; a man is imprisoned when he is under the control of another in these respects, or either of them, against his own will.

It is false imprisonment when this is done without lawful authority, and such imprisonment is deemed an assault in law, though no assault in fact is made; the one includes both offences, the act being unlawful. In actions for injuries of this kind, all parties who are proved to have taken any part in the assault, battery or imprisonment, are principals, and answerable for all acts done by themselves or by any others concerned in the transaction, by their order, consent or procurement, or in pursuance and furtherance of an object or enterprise in which they have all engaged, and which is illegal. If two or more agree or combine to effect an unlawful purpose, each one of the party is answerable for all acts done in, or leading towards the accomplishment of the joint object, directly connected with it or naturally consequential. If the object and purpose is entered upon and commenced by the parties concerned, and other individuals, or a crowd assembled in consequence, and consummate the act or join

[Johnson v. Tompkins and others.]

in its execution; the original parties are responsible for their conduct, though the immediate actors may be unknown to them, or have no other concerted agreement or connection with them, than by the unlawful acts committed, intended or tending to effectuate the original object and purpose.

If a man does an unlawful act, apt or likely to do an injury to some person, and an injury is actually caused thereby, it is immaterial by what intermediate hand it is inflicted, the first wrong doer is directly answerable to the injured party as the immediate trespasser; as where a man threw a lighted squib into a crowded markethouse, it was thrown by one and another, till it struck a person, and put out his eye—the man who first threw the squib was made answerable, 3 Wils. 407. So is the law where one man publicly and unjustly charges another with the commission of an offence or crime of which he is innocent, and an injury is inflicted on him by an excited crowd.

It is more dangerous than the squib, because more apt to be attended with fatal consequences, and no cry would be more exciting in Pennsylvania, in the most orderly community, than that of kidnapping.

You will then understand the law to be well settled, that it is not necessary to bring home to any of the defendants, the definite act which has caused the injury; the law fastens the consequences of any illegal act upon them, which they have, in any manner, as before mentioned, directly or indirectly done, brought about or caused.

Their mere presence, however, when the act is committed, does not make them accountable for it, without some participation on their part, or exciting, directing, consenting to or encouraging it—there must be some evidence of their acting, or causing others to act. If they take any part, you may consider any or each of them who do so, answerable for all that is done, unless you are satisfied that this interference was unconnected with the original and principal purpose.

If an illegal act is done under colour of legal authority or process, from an officer who had no jurisdiction of the subject matter, or whose order or process is made or issued in violation of the law, the judge or justice, and party procuring it, are trespassers, so is the officer and all who act under him, if the process is void on the face of it, 10 Coke 76, and his who procures such order on false pretences, is the most aggravated case. It is not necessary to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested, if he is ordered to do or not to do the

[Johnson v. Tompkins and others.]

thing, to move or not to move against his own free will, if it is not left to his own option, to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand, ready to be used—or there is reasonable ground to apprehend that coercive means will be used, if he does not yield. A person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force, is no consent to the arrest, detention or restraint of the freedom of his motion—he is as much imprisoned as if his person was touched, or force actually used; the imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary, till all efforts at coercion or restraint cease, and the means of effecting it are removed.

On the part of Mr Tompkins, it is contended that the plaintiff has failed in his action as to him, for want of the notice required by the act of assembly which has been read. *Purd.* 492.

This act applies to all official acts of a justice of the peace, and must be liberally construed so as to give them the full benefit of the protection intended by the notice. Though the act done is prohibited by law, and a penalty imposed, as for marrying a minor without the consent of his father, 5 Binn. 24, or arresting a party by warrant for an act which is no offence, as travelling on Sunday, or if in the honest exercise of his jurisdiction, he judges erroneously of the legal character and consequences of an act done, and treats as an offender, a person who has committed no crime, 5 Serg. & Rawle 301, 302, he is entitled to notice. On the other hand, if he acts from improper motives, in a case where he had no authority to act at all, or in the manner in which he did act, he will be deemed to have acted merely under the colour or pretence of his office, and not by virtue of it, and no notice is necessary. Nor if he took any part in this proceeding without intending to act as a justice of the peace in his official character, or did or directed any act to be done, in a matter whereof he had no jurisdiction. He must be clothed with official power to do the act officially, so that he is authorized to judge and decide whether the offence charged has been committed, or whether the thing done is punishable or within his cognizance—if he judges honestly, however mistakenly or ignorantly, he is entitled to notice in all such cases, though he cannot be justified in doing the act.

But if some things are indispensable to bring his official power into action, and those things appear not to have been done, his acts

[Johnson v. Tompkins and others.]

are null and void, and cannot be official ; as issuing a warrant of arrest on a criminal accusation, without probable cause, supported by oath or affirmation—the power to do this is expressly excepted from all the powers of the government, by the bill of rights of Pennsylvania.

No act can be by virtue of office, which the power of government is incompetent to authorize ; it must be taken to be by the mere colour of office, and no notice is necessary, whatever his motives or intentions were. It is for you to decide on all the evidence in the clause applicable to Mr Tompkins—how he acted in any of the scenes which occurred; you will consider him as any other defendant, as to all matters over which he had no official power to act, or in which he did not intend to act officially—you must find in his favour, if all his acts to the injury of the plaintiff were official.

These are points of law which furnish the rules for the decision of this case; you will apply the evidence you have heard to ascertain the facts as they bear on each defendant.

In contrasting the conduct of the respective parties, you can decide which has acted within and under the authority of the law, and which has violated it; if the evidence has made the same impression on your minds as on ours, there cannot be a doubt that the defendants have inflicted injuries on the plaintiff for which he is entitled to redress at your hands. If the rights with which he was clothed by the supreme law of the land, are to be neither respected or protected, you or we cannot be protected in its administration; our powers are derived from the laws and constitution of the state and union; his are from the same source and authority, and from one source higher than either. That power which can at its pleasure alter and rescind any of the provisions of the constitution itself, by a constitutional amendment; by that power Caleb Johnson is invested with and guaranteed in the enjoyment of rights which can be neither infringed or impaired by all the power of the state or general government, so long as the supreme law to which they are subordinate is obeyed. And shall it be permitted to individuals acting under the impulse of their own feelings and passions to do what is forbidden to the legislative power of the country, with no other check on their actions than what they may call the social law of the place, or public opinion? This case illustrates the effects of indulging that false philanthropy which prostrates the law and the constitution in its zeal against slavery; it extends not merely to make the slave

A P P E N D I X .

NOTE TO PAGE 91.

IN the case of Leland v. Wilkinson, reported in 6 Peters 317, 322, the supreme court seem to have disaffirmed the principle on which the pardon was admitted in the case of the United States v. Wilson and Porter. A paper purporting to contain copies of the proceedings of the legislature of Rhode Island in various cases from 1784 to 1827, authorizing the sale of the real estate of decedents for the payment of debts, was offered to the court to be read as evidence of the usage and law of the state. To the copy of each proceeding was annexed the following certificate :

“ True copy of the petition and vote (or order) thereon, and all the papers and documents on file.

“ Witness, HENRY BOWEN, Secretary.”

The copies were connected together with the certificates, to which was annexed the following certificate, with the seal of the state affixed.

“ By his excellency, Lemuel H. Arnold, governor, captain-general and commander-in-chief of the state of Rhode Island, and Providence plantations.

“ Be it known that the name ‘ Henry Bowen,’ to the aforewritten attestations subscribed, is the proper handwriting of Henry Bowen, Esq., who, at the time of subscribing the same, was secretary of the state aforesaid, duly elected and qualified according to law ; wherefore unto his said attestation full faith and credit are to be rendered.

“ In testimony whereof I have hereunto set my hand, and caused the seal of said state to be affixed, at Providence, this seventh day of January, in the year of our Lord one thousand eight hundred and thirty-two, and independence the fifty-sixth.

“ LEMUEL H. ARNOLD.

“ By his excellency’s command,

“ HENRY BOWEN, Secretary.

[SEAL.]”

The paper was rejected by the court for the reasons stated by the judges. The following dissenting opinion was delivered, which will fully explain the grounds of the decision in the circuit court, as to the effect of an authentication of a paper by the great seal of a state.

BALDWIN, J. dissenting.

By the first section of the fourth article of the constitution of the United States, it is ordained that, "full faith and credit shall be given in each state, to the public acts records and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts records and proceedings shall be proved, and the effect thereof." 1 Story IX.

In the execution of this power, congress enacted in 1790, "that the acts of the legislature of the several states shall be authenticated by having the seals of their respective states affixed thereto."

"That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk of the court and seal of the court annexed, together with the certificate of the presiding judge," &c. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. 1 Story 93. In 1804 a similar law was passed declaring that, "all records and exemplifications of office books, which are or may be kept in any public office of any state not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books and the seal of his office thereto annexed, if there be a seal, together with the certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the *governor*, the *secretary of state*, the chancellor or the keeper of the great seal of the state, that such attestation is in due form and by the proper officer, and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand the seal of his office, that the said presiding justice is duly commissioned and qualified, or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made; and the said records and exemplifications, au-

thenticated as aforesaid, shall have such faith and credit given to them in every court and office in the United States as they have by law or usage, in the courts or offices of the state from whence the same shall be taken." The same provisions are applied to the public acts, records, office books, and judicial proceedings, courts and officers of the territories, as those of the states. 2 Story 947, 948. By the thirty-fourth section of the judiciary act, the laws of the several states, except where the constitution, laws or treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Story 67. These papers, now offered and rejected, are certified by a person styling himself the secretary of state, and the governor, under the great seal of the state, certifies that the attesting officer is secretary of state, and "wherefore unto his said attestation full faith and credit are to be rendered."

This case mainly, if not wholly, depends on the validity of a law passed by the legislature of Rhode Island in 1792, the state had no written constitution, the powers of legislation were to be ascertained by the charter from the crown, and usage by the common consent of the people of the state. 2 Pet. 655, 656, 657. Such, too, was the situation of Connecticut. The powers of government were there like those of parliament. By the revolution, the duties, as well as the powers of government, devolved on the people of the several states. It is admitted that among the latter, was comprehended the transcendent power of parliament as well as that of the executive department, 4 Wheat. 192, 651; S. P., 8 Wheat. 98; 12 Wheat. 254; 2 Pet. 591. In 3 Dall. 387, 398, Patterson, justice, says; "The constitution of Connecticut is made up of usages. This usage makes part of the constitution of Connecticut, and we are bound to consider it as such, unless it be inconsistent with the constitution of the United States. True it is, that the awarding of new trials falls properly within the province of the judiciary, but if the legislature of Connecticut have been in the uninterrupted exercise of this authority in certain cases, we must, in such cases, respect their decisions, as flowing from a competent jurisdiction or constitutional organ; and therefore we may in the present instance, consider the legislature of the state as having acted in their customary judicial capacity. If so there is an end of the question. For if the power thus exercised, comes more properly within the description of a judicial, than of a legislative power, and if by usage, or the constitution, which in Con-

necticut are synonymous terms," &c., 3 Dallas. 395, 396. *Calder v. Bull*, S. P., by Chase, justice, 392, 393; by Iredell, justice, 398; and by Cushing, justice, 400, 401. Usage then forms the supreme law of Connecticut. "By the charter of Rhode Island the power to make laws, is granted to the general assembly in the most ample manner, so as such laws, &c., be not contrary and repugnant unto, but as near as may be agreeable to the laws, &c., of England, considering the nature and constitution of the place, and people there: what is the true extent of the power thus granted must be open to explanation, as well by usage as by construction of the terms in which it is given," *Wilkinson v. Leland*, 2 Peters 657. So that usage is part of the constitution or supreme law of Rhode Island, and so it is universally admitted to be that of England.

I have not examined through the decisions of the English courts, in order to ascertain whether the acts, rolls and records of parliament, attested by the officer who keeps them, accompanied by the official certificate of the lord chancellor, under the great seal of the kingdom, "that unto his said attestation full faith and credit ought to be given" would be deemed a sufficient authentication of their laws, usages and proceedings, so as to authorize them to be read in the court of chancery, king's bench, or house of lords, on appeal or writ of error; or whether these courts would suspend their judgment, and remove the cause for trial at the bar of any court, or a judge at nisi prius, and wait for the verdict of a jury to ascertain, as a matter of fact, what was the law of parliament or the constitution of the kingdom. That task will be left to those who would assimilate the fundamental law of a sovereign state of this union to a local custom, or a fact, which this court cannot notice or know, until found by a jury, trying an issue under the direction of an inferior court of the United States.

In England all the customs of cities, ancient boroughs, &c. are confirmed by Magna Charta, chapter nine. "The city of London shall have all the old liberties and customs which it hath used to have." Keble's Statutes at Large 2. If the custom is denied, it shall not be tried by an inquest, but by the certificate of the mayor, by the mouth of the recorder, 2 Co. Inst. 126, and a writ goes to the mayor to certify, except when the city is concerned in interest, 5 Day's Com. Dig. 12, 16; London E. recorder; or it may be proved by affidavit. 4 Burr. 2032, 33. If the constitution of a state cannot be judicially known in this court by its legislative acts, certified as these are, and offered to our consideration under the injunctions of

the constitution and laws; if the certificate of the secretary and governor, under the seal of the state, are not as high evidence of the custom and usage of Rhode Island, as an affidavit made in the king's bench during the pendency of a motion for a prohibition, or the certificate of the recorder of a city corporation; it would seem to have been more agreeable to the rules of the common law, at least to have directed our writ to some other officer, if not more competent, at least as competent as those who have given these certificates, and under at least as high evidence of authority as the great seal of the state, ordering him to certify to us the custom and usage of the legislature of Rhode Island, as its supreme law, the legislative power. It is settled law in England, that a court will not award an inquest to ascertain the custom of a corporation which is denied. I will examine what have been the rules of this court on this and similar subjects. *Calder v. Bull* came before this court on a writ of error to the supreme court of Connecticut under the twenty-fifth section of the judiciary act; the question depended on the usage of the legislature of Connecticut, to act in a judicial capacity in granting new trials, not as a question of fact but of law, and the court decided it on evidence of their legislative acts, and the best evidence that could be obtained, showing the usage. 3 Dall. 386, 401.

In *M'Keen v. Delancy*, the only question was, whether the exemplification of a deed should be read in evidence at the trial, it depended on the usage and practice of the courts in Pennsylvania under the state recording act, and was a preliminary question for the court and not for the jury in the court below. In this court it was a pure question of law. The chief justice observed: "If cases are reported, the court will take other information as to the construction given to the law by the courts of Pennsylvania." "If such have been the uniform decisions of their courts at the time, as there are no reports of cases, if the counsel agree as to the construction given by the courts, the court can receive it as evidence of those decisions." In giving the opinion of the court, they observe: "It is also recollected that the gentlemen of the bar who supported the conveyance, spoke positively as to the universal understanding of the state on this point, and that those who controverted the usage on other points, did not controvert it on this." "But what is decisive with the court is, that the judge who presides in the circuit court for the district of Pennsylvania, reports to us that this construction was universally received. On this evidence, the court yields the construction which would be

put on the words of the act, to that which the courts of the state have put on it, and on which many titles depend. 5 Cranch 22, 29, 33.

In *Hind v. Vattier* this court decided, that a copy of a patent from the United States for land in that state, contained in a volume of land laws published by the authority of the legislature, was evidence of the grant; the judge who tried the cause in the circuit court declaring that it was received as evidence in the courts of that state. 5 Pet. 400. In *Green v. Neal*, at this term (6 Pet. 292), one reported case, the statement of the judge of the circuit court, and the certificate of the gentlemen of the Tennessee bar, as to the decision of the supreme court of that state, in construing their limitation laws, were held sufficient evidence of local law and usage since 1825, though not found by verdict or proved by any exemplification of any records or judgments of the supreme court of the state; on which this court annulled two of its own solemn, direct opinions, and at least one indirect judgment, on the same statute, and in opposition to two decisions of the same state court, made in 1815, and reported in 1 Wheat. 481, 482; 2 Pet. 241, 242; 11 Wheat. 331.

In the case of *Gardner v. Collins*, which came before this court, on a certificate of decision from the circuit court of Rhode Island, they declared: "If this question had been settled by any judicial decision, in the states where the land lies, we should, upon the uniform principles adopted by this court, recognise that decision as evidence of the local law. But it is admitted that no such decision has ever been made. If this had been an ancient statute, and a uniform course of professional opinion and practice had long prevailed in the interpretation of it, that would be respected as almost of equal authority. The court took it up and considered it as an open question, to be settled by the true construction of the statute itself, on which the case wholly depended. 2 Pet. 84, 85, 86.

Thus we find the settled course of this court for thirty-three years to be, to ascertain the usage of a state legislature acting under a charter of the crown and state usage, from the legislative acts themselves, and the best sources of information in their power, in order to judicially know the extent of the legislative power of a state under its charter or unwritten constitution, as the supreme law. If they wish to judicially know, and adjudicate in the last resort on the statute laws of a state, the construction and usage of their courts, or the universal understanding of the profession and the state; they resort to the records or reports of state courts, the statements or certificates of members of the bar; and to the certificate of a judge of

this court presiding in the federal court within the state, as decisive evidence of the local usage. They will then yield their own construction, and construe a state law according to such usage decisively proved. If these sources of information are insufficient, if they fail in their resort to "the fountains and rivulets of the law," the question is open on the construction of the statute itself, but this court has never before remanded a cause to the circuit court, in order to be informed by a jury, as a matter of fact, what is the constitutional, the statute, or the common law of a state. I next proceed to consider whether these papers were evidence of the acts certified to have been done by the legislature of Rhode Island, considered as the public acts of a state within the words of the constitution and acts of congress, or as laws or legislative proceedings of a state of this union, according to the settled rule of this court.

In the *United States v. Amedy*, a question arose on the admission in evidence of an act of incorporation by the legislature of Massachusetts, the papers were printed copies of the acts, with certain erasures and interlineations in writing, and to the copy was annexed a separate attestation, in these words. "A true copy. Attest, Edward D. Bangs, secretary." The copies were attached together, exemplified under the great seal of the state, with the following certificate annexed. "Commonwealth of Massachusetts, secretary's office. I certify that the printed copies of the act following, &c. have been compared by me with the original act on file in this office, and that the same are *now* true copies of the said original act. In testimony whereof I hereunto set my hand and have affixed the seal of the commonwealth, the day and year above mentioned. Signed, Edward D. Bangs, secretary of the commonwealth." On this question the language of the court is as follows. "It is matter of most serious regret that an exemplification so loose and irregular should have been permitted to have found its way into any court of justice. As it has, it is our duty to decide upon its legal sufficiency. It is under the seal of the state, and verified by the certificate of the secretary. It is said this is not enough, and that it ought to be shown that the secretary had authority to do such acts." This objection must be determined by the act of congress of 24th May 1790; after reciting it the court remark; "no other or further formality is required, and the seal itself is supposed to impart absolute verity. The annexation must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof, and competent authority to do the act." We know, in point of fact, that the constitution

of Massachusetts has declared "that the records of the commonwealth shall be kept in the office of the secretary." But our opinion proceeds upon the ground that the act of congress requires no other authentication than the seal of the state, 11 Wheat. 406, 407. In the United States v. Johns, Judge Washington, in construing this act of congress says: "It does not require the attestation of any public officer in this case, although in all the cases afterwards provided for, such an attestation is required. There is good reason for this distinction. The seal is in itself the highest act of authenticity, and leaving the evidence upon that alone precludes all controversy as to the officer authorized to affix the seal, which is a regulation very different in the different states. The exemplification of the law of Maryland in this case was under the great seal, but not attested by the governor or any other principal officer of the state. 4 Dall. 415, 416. In Young v. The Bank of Alexandria, on a motion to quash a writ of error, this court admitted a printed paper purporting to be an act of assembly of Virginia, incorporating the bank, and said: "The opinion of the court is very strong, that this is a public act, and that if it were not, its being printed by the public printer, by order of the legislature, agreeably to a general act of assembly for that purpose, it must be considered as sufficiently authenticated. 4 Cranch 384, 388. In Patterson v. Winn, decided at last term, this court declared: "We think it clear by the common law, as held for a long period, that an exemplification of a public grant under the great seal, is admissible in evidence, as record proof, of as high a nature as the original. It is a recognition in the most solemn form by the government itself, of the validity of its own grant, under its own seal, and imports absolute verity, as matter of record, 5 Pet. 241. In Kelly v. Astor, at this term, this court held that an extract of the proceedings of the house of assembly, copied from the journals, was admissible evidence of the public legislative proceedings of the state. (6 Pet. 630.)

It did not occur to the court, in any of these cases, that it was necessary to remand the cause to the circuit court, to ascertain the verity of a public act of a state, authenticated by its great seal, or that to authorize its being given in evidence to a court, it required a verdict of a jury, as on a plea of *non est factum*. The rule of law, that it is sufficient proof of the by-laws of a corporation that they are certified under its corporate seal, is recognised by this court. The books of a corporation, proved by the present clerk to be in the handwriting of the deceased clerk, and the president of a board of trustees, incorporated for public purposes, are the best evidence of

their acts, and ought to be admitted wherever these acts are to be proved; *Owings v. Speed*, 5 Wheat. 423, 424; so of the tax book of the corporation of this city, made up by its officers, *Ronkendorf v. Taylor*, 5 Pet. 358, 360. I need pursue this branch of inquiry no further.

As the court has decided that the acts of the legislature of Rhode Island must be proved as foreign laws, I shall next examine that point through some of the decisions of this court.

“That the laws of a foreign nation designed only for the direction of their own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court in respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing power of a country, can be noticed as law by a court of law of that country, or must be still further proved as a fact. The negative of this proposition has not been maintained in any of the authorities which have been adduced, on the contrary several have been quoted (and such seems to have been the general practice), in which the marine ordinances of a foreign nation, are read as law without being proved as facts.” It is said this is done by consent, &c. “If it be correct, yet this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts.” It is therefore the opinion of the court, that the decree should be read as an authenticated copy of a law of France, interesting to all nations. *Talbot v. Seaman*, 1 Cranch 38.

“It is very truly stated, that to require respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this, as in all other cases, no testimony will be required which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments, which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict by the seal of the nation, would be rejected, unless the fact would appear to the court. Nor can it be presumed that any difficulty exists in obtaining a copy. Indeed in this very case, the very testimony of-

ferred would contradict such a presumption. The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul as well as his certificate. If it be true that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified." *Church v. Hubbert*, 2 Cr. 238, 239. "The commission therefore of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable." "If signed by the proper authorities of the nation to which she belongs, it is complete proof of her national character." "Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he had not conceded the jurisdiction, and where it would be inconsistent with his own supremacy." *Santissimeria Trinidada*, 7 Wheat. 335, 336. If this is the rule as to the acts of the government of Buenos Ayres, I should think it applicable to the case of sending a cause back to the circuit courts to try by a jury under the direction of one of the judges of this court as a fact, the existence of a usage which was part of the supreme law of a sovereign state of this union.

But if on deciding on that usage or law this court should refuse to give credence to its public acts, authenticated by the great seal of the state of Rhode Island, it would be placing them, as a matter of evidence, on a footing with the unacknowledged governments of South America. Their seal is repudiated. The seal of such unacknowledged governments cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits of, and the fact that a vessel or person is employed by them may be proved as a fact, without proving the seal. *United States v. Palmer*, 3 Wheat. 635; *The Estrella*, S. P., 4 Wheat. 304. I next consider these papers, as evidencing a judicial proceeding by the legislature of Rhode Island.

If they are to be considered as the supreme judicial tribunal of the state, and the transcripts of their records and proceedings so certified are not full evidence and absolute verity in all the courts of the United States (showing their decisions and adjudications in the

cases referred to), under the provisions of the constitution and laws, they are at least of as high authority as the tradition and understanding of the members of the bar, or their statements presented for our consideration, books of reports, or the statement and certificate of a judge of this court, the last of which is decisive in this court, 5 Cranch 33. If they are foreign judgments, they "are authenticated in three ways. 1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received." 2 Cranch 238, 239.

When a sentence or judgment of a foreign court of admiralty is thus proved, it is conclusive proof of its own correctness. *Maley v. Shattuck*, 3 Cranch 488. If it is a sentence of condemnation, it "is conclusive as to the offence for which the vessel was condemned,"—"so conclusive of the facts decided, that they cannot be controverted directly or collaterally, in any other court having concurrent jurisdiction;" conclusive between the same parties upon the same matter, coming incidentally in question in another court for a different purpose;" "conclusive of the right it establishes, and the fact which it directly decides." *Croydon v. Leonard*, 4 Cranch 435, 436, 443. "The question therefore respecting its (the sentence or judgment) conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry." *Williams v. Armroid*, 7 Cranch 432; *Hudson v. Gustin*, S. P., 6 Cranch 283, 284. A decree of a court of competent authority of the highest jurisdiction, is conclusive and final in cases of capture, as much as the decisions of this court upon a writ of error from a circuit court. *Penhallow v. Doane*, 3 Dallas 96; S. P., 9 Cranch 143; *Gelston v. Hoyt*, 3 Wheat. 314, 315.

The same effect is given to the judgments of the state courts; they have the same effect, credit and validity in every other court in the United States, which they have in the state where it was pronounced; whatever pleas would be good to a suit thereon in such state, and none other, can be pleaded in any other court in the United States, under the constitution and laws thereof. *Hampton v. M'Connell*, 3 Wheat. 235; *Mills v. Duryee*, 7 Cranch 483, 484; *Hopkins v. Lee*, S. P., 6 Wheat. 109, 113; *Matthew v. Thatcher*, S. P., 6 Wheat. 129, 130. "The judicial department of every gov-

ernment, is the rightful expositor of its own laws, emphatically of its supreme law." If, in a case before a court, a legislative act conflicts with the constitution, the court must exercise its judgment on both, and the constitution must control the act. "That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason. *Bank of Hamilton v. Dudley*, 2 Peters 524." "There is nothing in the constitution of the United States, which forbids the legislature of a state to exercise judicial functions." "It may safely be affirmed, that no case has ever been decided in this court upon a writ of error to a state court, which affords the slightest foundation to this objection." *Satterlee v. Matthewson*, 2 Peters 413.

Such were the principles and rules established by this court, in relation to the laws, edicts and decrees of foreign nations, and the constitution, laws and judicial proceedings of the states of this union, which were applied to the very proceedings now in question, and in this case when it was before this court in 1829, and turned on the validity and effect of the act of 1792, in relation to the property then and now in controversy. "If that act was constitutional, and its terms, when properly construed, amount to a legal confirmation of the sale and proceedings thereon, then the plaintiff is entitled to judgment, and the judgment below was erroneous. If otherwise, then the judgment ought to be affirmed. *Wilkinson v. Leland*, 2 Pet. 655. The objection to the act is, that it is void for the want of authority, and that its terms do not give validity to the sale. We must decide this objection, however, not upon principles of public policy, but of power; and precisely as the state court of Rhode Island itself ought to decide it. *Ibid.* 656; *S. P.*, 5 Pet. 401. "We do not think that the act is to be considered as a judicial act; but as an exercise of legislation, it purports to be a legislative resolution and not a decree." *Ibid.* 660. "The present case is not so strong in its circumstances as that of *Calder v. Bull*, 3 Dall. 386, or *Rice v. Parkinson*, in both of which the resolves of the legislature were held to be constitutional. *Ibid.* 661. "This is a legislative act, and is to be interpreted according to the intention of the legislature apparent on its face." *Ibid.* 662. It is not an act of confirmation by the owner of the estate; but an act of confirmation of the sale and conveyance, by the legislature in its sovereign capacity. The judgment was reversed. *Ibid.* 663.

It must then be taken as the settled, declared law of this case, that the proceedings of the legislature of Rhode Island in relation to the

sale of the estates of deceased debtors, are acts of legislation in its sovereign capacity, in other words they are the laws of the state. It follows, that as the proceedings now offered in evidence are of the precise nature and character as those contained in the act of 1792, they must also be considered as laws of the state in its sovereign capacity, if they are authenticated, according to the constitution, the law of congress, or the decisions of the supreme court of the United States in their construction. Taking them as the laws of the state, authenticated under its great seal, "full faith and credit shall be given to them" as the "public acts and records of the state;" in the words of the constitution, "as the acts of the legislatures of the several states," in the words of the act of 1790, or in the words of this court, as the "laws, edicts or decrees of a foreign nation, or as an authority to the administrator to sell, in the nature of a commission to a privateer;" they are evidence in all the courts of the United States, as the acts of foreign governments, whose great seal imports absolute verity to them as records.

If on the other hand these proceedings are judicial, the seal and certificate annexed to them, give them the same effect as the judgments or decrees of the highest judicial tribunal in the state, on the validity of which this court must decide precisely as the courts of Rhode Island must do. So if taken as the sentences, judgments, or decrees of a court of a foreign nation, authenticated by its great seal, they are final and conclusive on all matters adjudicated, or facts decided; not to be controverted, or inquired into directly or collaterally.

Such would be the effect of these proceedings so certified from any state of this union or any foreign state, but they assume a higher character than ordinary acts of legislation by states, by congress, or the highest courts in the nation or state, where all the powers of government are limited by written constitutions. The charter and legislative usage of Rhode Island are its only constitution, the acts of its legislature are its usage, the evidence of its supreme law as recognised by the people of the state through all time; when therefore its great seal stamps absolute verity on every other proceeding, whether legislative or judicial, it is strange that it does not justify this court, to look at a series of legislative acts in one uniform course for forty-three years on the same subject now before us, as any, even *prima facie* evidence of its legislative usage, and as such the constitution and supreme law of the state. On refusing to hear the proceedings read to the court, as evidence of such a law, the cause is remanded to the circuit court, and a jury, to ascertain as a matter of

fact, the very fact which is certified to them under the great seal, the fact of "the usage of the state," "a custom in Rhode Island," or "private laws and special proceedings," as "matters of fact, to be proved in the ordinary way."

A very different character was assigned to such proceedings when this cause was before this court in 1829; they were then legislative acts, to be construed by the intention apparent on their face, acts of the legislature in its sovereign capacity, 2 Pet. 662, 663. Admitting them to have been private laws, no one ever pretended that a copy certified by the secretary of state, under the great seal, was not sufficient evidence of its enactment; in the case of *Amedy* the law was a private act of incorporation, 11 Wheat. 406; so in the case of *Johns*, 4 Dall. 415; so in *Young v. The Bank of Alexandria*, in which this court held it sufficiently proved as a private act by producing a paper printed by the public printer, by order of the legislature, or agreeably to a general act of assembly for that purpose, 4 Cranch 288. In the former cases the seal imported absolute verity to the copies of private acts; now these proceedings are called "private laws," the great seal, so far from verifying the copies conclusively, is not even presumptive or prima facie evidence of their verity, so as to put the party objecting to their admission, to any rebutting proof; the papers offered are of course mere blanks, and no faith or credit is given to them as the "public acts or records of a state," as "acts of the legislature, or judicial proceedings," and they are rejected as mere nullities.

When the cause goes to the jury to ascertain the matters of fact, whether such "special proceedings" as are now certified, did in fact take place, whether the legislature did in fact pass those "private laws," and whether in fact there was in the state an "usage or custom" such as must necessarily exist, if such laws had actually been enacted, during a period of more than forty years, the jury will be in the same predicament as this court now is. The circuit court must charge the jury on the law, precisely as the court of the state ought. They must tell them that these papers must have the same effect in the courts of the United States as in those of Rhode Island; if they are nullities in the one, they are equally so in both; if they import absolute verity as records, in the state courts, they import the same verity in the federal courts; or that if they are prima facie evidence, as a presumption that the fact was as is certified by the great seal; such presumption shall prevail till the contrary is proved. If they are nullities, the "fact" must be proved by better

evidence than the papers as certified; if the decisions of this court are to furnish the test of *better evidence*, it consists in the certificate of a judge, of members of the bar, their declaration of the usage of a state, the general understanding of the profession, as in 5 Cranch 22, 33; 2 Pet. 84, 85, a paper printed by the public printer, 4 Cranch 288, a book of land laws of a state, 5 Pet. 400, a fortiori, by showing that the legislature had passed similar acts before and after, as in *Calder v. Bull*, 3 Dall. 395. Such evidence has hitherto been deemed satisfactory to this court, without a reference to a jury, and if competent to the court, it is so to the jury, for what is matter of law is equally binding on both. There appears therefore no reason why the court should remand the cause to ascertain a question of local law, which can better be decided here, on the same evidence which has been so often held sufficient. The judge of the circuit and members of the bar are present, and can certify the usage of the state; the proceedings can be returned to the state, and when printed by the public printer can be sent back "sufficiently authenticated." On the other hand, if the jury are instructed to take the certified papers as absolute verity, an issue is equally useless; for a verdict could give no additional sanction to that which was verity itself, and which neither court or jury could falsify or inquire into. Or if the papers are only presumptive evidence of the facts certified, and those facts, per se, constitute a local law or usage, they stand as evidence here or in the circuit court, until disproved by something entitled to higher credence than the great seal. Nay, if the states of this union are of equal rank with the corporations of cities or even ancient boroughs, this court ought not to award an inquest; the governor of the state, who may be considered as the mayor, and the secretary as the recorder, have duly certified the by-laws and customs of the corporation, under its corporate seal, 2 Co. Inst. 126; 5 D. C. D. 12, 16, and may be willing to superadd an affidavit to what they have so certified. 4 Burr. 2032.

For these reasons I am clearly of opinion, that the papers offered are not only evidence, but conclusive proof of the law, usage, and constitution of Rhode Island, which we are bound by the constitution, laws, and our own most solemn, repeated and uniform adjudications, to receive and respect. As I consider the decision of the court in this case by far the most important which has ever been made, I could not content myself with the hasty opinion delivered yesterday; it seemed proper in such a case as this, to give the reasons and the authority on which my opinion has been formed, in

opposition to the course now taken by the court. I cannot refrain from so doing, when I reflect, that I am sitting here under a constitution of government to which Rhode Island is a party; and although I have in the course of this opinion, in answering the positions taken in opposition, considered the effect of her legislative acts authenticated under the great seal of the state. Yet it must be distinctly understood, that I utterly deny, and solemnly protest against the doctrine; that the states of this union, the people whereof gave life and being to this court, and under whose delegation we exercise all our powers, are to be considered and treated by us as foreign states, or that their fundamental laws must be first ascertained as facts, by a trial by jury in the circuit court, in order to give us judicial information of the truth of an attestation, made conformably to the constitution.(a)

(a) 'On this case being remanded to the circuit court, there was no verdict taken on the "facts," in relation to the usage of the state; the judges certified a difference of opinion, on the validity of the act of 1792 and the deed made pursuant thereto, and the cause was finally decided by the unanimous decision of the court. That under that law and the deed, the grantees took an absolute title to the property in controversy. 10 Pet. 294, 297.

INDEX

OF

PRINCIPAL MATTERS.

ABATEMENT.

A suit in equity does not abate by the death of a co-plaintiff or co-defendant.

If one plaintiff and one defendant survive, the suit is open for amendment,	192
Plea in abatement in suit in equity, nature and requisites thereof,	414

ABOLITION SOCIETY OF PENNSYLVANIA,	587
--	-----

ACCOUNT.

Where suit at law or bill in equity lies for, and where not,	409, 418, 423
When it is barred by time and acquiescence,	418, 495, 569
Decree for, limited to six years,	419, 461
Plea to an action or bill for account,	418
Acquiescence in an account rendered makes it a stated one,	418, 539, 542
When a stated account can be opened, and when not,	418, 540
Accounts of the state of Pennsylvania and John Nicholson,	432
Accounts, what cognizable in the admiralty,	545, 546
Accounts against the master of a vessel, when to be rendered,	570

ACCOMPLICE. *Vide* EVIDENCE.

ACQUIESCENCE IN ACCOUNTS. Effect of,	418, 539, 542
--	---------------

ACKNOWLEDGEMENT OF A MARSHAL'S OR SHERIFF'S DEED. Effect of,	272
---	-----

ACTUAL DAMAGES IN PATENT CASES. What are,	325
---	-----

ACTS. To be performed in execution of a contract, when, by which party,
and demand of performance (*Vide* MARRIAGE), 493, 495

ACTS OF ASSEMBLY.

New Jersey.—Acts of 1808 and 1822, relating to fisheries in the Delaware, 69
Act for recording deeds (Rev. Code 747), 365
Act authorizing an alien to hold lands, 216
Act to incorporate the Camden and Amboy Railroad, Co., 216
Act for distribution of intestate estates (Rev. L. 174, 179), 181, 187
Ohio.—Occupying claimant law, 406
Pennsylvania.—Act of 1777, adopting the common law, 121
Act of 1794, refunding bonds, 130
Acts of 1785, 1789 and 1805, relating to special juries, 123, 127
Acts of 1700, 1705, 1806, for the sale of lands on execution, 268, 278, 428
Act of 1798, limiting the lien of judgments, 273
Acts of 1705, 1794, directing sales by the orphans' court, 282, 283
Act of 1718, relating to the power of the supreme court, 406
Acts of 1782, 1785, 1789, 1790, 1791, relating to public accounts, 426, 441
Acts of 1806, 1807, relating to John Nicholson's estate, 428, 436
Acts of 1799, 1818, authorizing the sale of lands of minors, 476, 492
Acts of 1780, 1788, 1820, relating to slaves and kidnapping, 582, 585
Act of 1770, fugitive apprentices, 585
Act of 1789, abolition society, 587
Act of 1772, directing notice to justices of the peace, 602

ACTS OF CONGRESS.

Acts of 1792, 1794, 1799, 1810, and 1825, punishing mail robbery, 92, 96
Acts of 1790, 1819, 1820, relating to crimes on the high seas, 25, 29
Act of 1799, for the collection of the revenue, sects. 36, 62, 45, 139, 140, 504
Act of 1790, relating to foreign ministers, sects. 25, 26, 27, 238, 243
Act of 1789, organizing the department of state, 238
Acts of 1790, 1793, 1800, relating to patents for inventions, 309, 315, 317, 320, 325
Act of 1816, punishing forgeries on the bank of the United States, 293, 367, 371, 511, 514, 520
Act of 1789, judiciary act, sect. 29, act of 1802, relating to juries and trials, 117, 119, 127, 131
Act of 1789, sect. 11, jurisdiction of the circuit court, 135, 430
Act of 1789, sect. 16, relating to suits in equity, 403, 409
Act of 1789, sect. 32, on amendments, 195
Act of 1789, sect. 34, declaring state laws rules of decision, 72, 74, 274, 301, 449
Act of 1789, sects. 9, 11, 13, 14, 16, 17, jurisdiction of district and other courts, 562, 563
Act of 1790, crimes; act as to murder in a fort and treason, 118, 119
Acts of 1789, 1792, for the regulation of process, 274, 275, 563
Act of 1790, for the regulation of seamen and recovery of wages, 505, 567
Act of 1793, for the apprehension of fugitive slaves, 579
Acts of 1790, 1804, for the authentication of public acts and records of states, Appendix, 608

ACTS OF PARLIAMENT.

Statutes 22, 23, 29 Car. 2, for distribution of intestate estates, 181, 187

ACTS OF PARLIAMENT—CONTINUED.

Statute 13 Ed. 1, stat. 1, ch. 45, giving a writ of scire facias,	275
Statute 21 Jac. 1, ch. 3, authorizing patents for inventions,	309, 317, 320
Statute 13 Eliz., ch. 5, fraudulent conveyances as to creditors,	356, 358, 532
Statute 28 Hen. 8, statute of uses,	363
Statute 20 Ed. 3, ch. 1, powers of courts,	406
Statute 1, 2 Geo. 4, ch. 76, sea and ship stores,	508
Statutes 13 Rich. 2, ch. 5, 15 Rich. 2, ch. 3, 2 Hen. 4, ch. 11, admiralty jurisdiction,	548
Statutes 28 Hen. 8, ch. 15, 27 Eliz. ch. 11, criminal jurisdiction of admiralty,	553
Statute 33 Ed. 1, challenges to jurors by the crown,	82
Statute Ed. 3, relating to treason,	120
Statutes 3 and 21 Geo. 2, relating to juries,	126

ADMIRALTY JURISDICTION. *Vide* CASES IN ADMIRALTY.

An account for provisions furnished to the owner or commander of a vessel, or for articles for her use when not on a voyage or in a foreign port, is not within the admiralty jurisdiction of the district court, either as a substantive distinct claim or as an off-set to a libel for seamen's wages,	545, 568
Admiralty jurisdiction is referred to in the constitution as it was restrained by the statute and common law in England before the revolution, and as it was exercised by the state courts before the adoption of the constitution,	554
The rules which regulated it and the cases where it can be exercised, considered libels for seamen's wages, as held in England, not to be within the statutes which restrain the jurisdiction of the admiralty, either as being excepted cases or as coming within the rule of <i>communis error facit jus</i> ,	566
Contracts of seamen for maritime service are in effect maritime contracts, governed by the maritime law, which prescribes the rights and obligations of the parties differently from the common law,	567
In the United States they are regulated by the act of 1790, which gives seamen a right to proceed in the admiralty for the recovery of their wages,	567
The seventh amendment to the constitution excludes the jurisdiction of admiralty over contracts regulated by the common law; suits upon such contracts are appropriately "suits at common law" within the terms of the amendment, and are cognizable only in courts of common law,	556, 568
No off-set is allowable on a libel for seamen's wages, unless a payment on account thereof,	568
No account against the vessel is chargeable to the master, unless it is presented in a reasonable time, so that the master may charge it to the owners before settling with them,	571

AGENT. *Vide* PRINCIPAL AND AGENT.

The agents of a corporation may be sued in this court, though the corporation are not suable here,	216
--	-----

AGREEMENT. *Vide* CONTRACT. MARRIAGE.

ALIEN.

- An alien resident in New Jersey, who holds land under a special law of that state, may sustain a suit in the circuit court relating to such land, 216
- When an alien sues a corporation it is no objection that one of the stockholders is also an alien, if the agents of the corporation are also defendants, 216

AMENDMENT.

- The averment of citizenship of a party may be added at any stage of the cause, if the amendment is moved for in a reasonable time after the defect is suggested, 193
- The staleness of a demand, or the want of proper parties, is no objection to amend the bill, 194
- Where a defendant had answered generally to a matter, of which he had no particular knowledge, he was allowed to file a supplemental answer on the same subject, after he had acquired particular information concerning it. He may introduce into such answer, new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it, 289, 290
- Applications to amend an answer are in the discretion of the court, 289, 290

AMENDMENT TO THE CONSTITUTION. Effect of, 561, 598**ANSWER IN CHANCERY. *Vide* AMENDMENT.**

- A party must rely on the case stated in his bill or answer; if he sets out a contract in writing, he cannot recover on a verbal one not set up in the bill or answer, 491
- A general allegation in a bill against an executor, that he retains the money of the estate in virtue of a pretended debt, claimed from the testator by a pretended contract which the bill denies, and the prayer of the bill is generally for an answer to the matters charged therein, does not make the answer of the executor evidence to support such debt, when he admits there is money of the estate in his hands, for which he must account if he does not establish the debt, 494
- An answer denying the right of a complainant is evidence in favour of a defendant, 494
- But if he admits the right, and sets up new matter in bar; if he admits the charge, and avers a discharge at a different time by a distinct transaction, or sets up an affirmative claim in his own right to the subject matter claimed by the complainant, it is not evidence in his favour; the defendant must make out his case as a plaintiff ought to do, 491, 495

ARREST. *Vide* FOREIGN MINISTER.

- Arrest defined, 239
- The right of bail to arrest principal, 577, 584
- Of a master to arrest his servant, apprentice, redemptioner or slave, 577, 581, 590
- When an arrest may be made on Sunday, and when not, 580
- Where may be arrest on commission or suspicion of felony without warrant, 580
- Party arresting in such case is liable in trespass, if the person arrested is not guilty, 581

ARREST—CONTINUED.

- But if the arrest is by a warrant from a proper officer, no action lies, . 581
The same rule applies where a person is arrested as a slave, . 582

ASSAULT AND BATTERY. (*Vide EVIDENCE.*) Defined, . 600

BAIL. *Vide INSOLVENT LAW.*

- Bail to the sheriff entered special bail; on being excepted to he refused to justify, whereupon he was sued on the bail bond; he surrendered the principal before the return of the writ. Held, that the surrender was good, and the bail entitled to relief on the usual terms, . 149
No justification of bail is necessary where it is entered for the purpose of making a surrender, . 152
Bail may take principal on Sunday, or in another state, . 577

BANK OF UNITED STATES. *Vide CRIMINAL LAW.*

BANKRUPT LAWS. *Vide INSOLVENT LAWS.*

BILLS OF EXCHANGE. *Vide LEX LOCI.*

- A promise to accept a bill is an acceptance when the bill is duly drawn and taken bona fide on the faith of the promise, . 45

BILL OF LADING. *Vide DAMAGES. TRESPASS.*

BILL IN EQUITY.

- When it lies for discovery, . 405, 408, 417
For an account, . 418, 423
For the execution of a trust, . 420, 423
For an injunction, . 217, 409
When affidavit to bill is necessary, . 412
Demurrer to bill, when lies, . 409
Nature of, . 411
When overruled, . 413
When not necessary, . 411
When necessary, . 413, 416
Judgment on, . 411
Plea to bill, . 414
Objection to for want of equity in bill, . 415, 416

BONDS, REFUNDING.

- Bonds executed here, in virtue of a power of attorney executed in France before a notary, according to the law of that country, but not under the seal of the complainants, were held not to be such as were required by the law of this state, . 131
The seal of a party is necessary to give a paper the effect of a bond in preventing the bar of the act of limitation, and giving it priority as a specialty in paying the debts of a decedent, . 131

CASES IN LAW, EQUITY, AND OF ADMIRALTY JURISDICTION.

- These terms are used in the constitution, the judiciary and process acts, according to the jurisprudence of England, defining them, in contra-

CASES IN LAW, EQUITY, AND OF ADMIRALTY JURISDICTION—CONTINUED.

- distinction to each other by the rules and principles of the common law as adopted and in force in the several states at the revolution, or the adoption of the constitution and passage of the acts of congress in 1789, 403, 411, 550, 554, 557, 565
- The term "suits at common law" in the seventh amendment has the same meaning as the term "cases in law" in the third article of the constitution, 405, 554
- If a case is cognizable at common law the defendant has a right of trial by a jury, and a suit upon it cannot be sustained in equity, . . . 404, 405, 407
- If a case is cognizable in equity, the defendant has the right to answer on oath, and have the benefit of it as evidence in his favour, he cannot therefore be sued at law in such case, 407
- The admiralty jurisdiction of the district court being exclusive, cannot be extended to cases in law or equity cognizable by the circuit court and state courts, under the eleventh section of the judiciary act, . . . 557, 562, 564
- Nor to cases in which prohibitions had been granted by courts of common law in England, or in which the supreme court are authorized to grant prohibitions by the thirteenth section of the judiciary act, . . . 563
- What are cases of equity jurisdiction, and its extent, 403, 408
- Cases of admiralty jurisdiction, 550, 568

COMMON LAW.

- The terms "usages and principles of law" "courts of law and equity" and "admiralty," as used in the acts of congress, refer to the common law, 557, 563
- And not to the civil law, which recognises no line of discrimination between the jurisdiction of courts of law, equity and admiralty, . . . 550, 563
- The common law is the basis of the jurisprudence of the states, . . . 553
- It is a general rule, unless altered by acts of assembly or usage, and if any exceptions to it are alleged, they must be made to appear, . . . 553

COMPACT.

- New Jersey and Pennsylvania, 69, 70
- Between the proprietors and people of New Jersey, 73

CONSTITUTION OF UNITED STATES.

- Article 4, sect. 1. Acts, records and judicial proceedings of states, . . . 91, 608
- Article 3, sect. 2. Place of trial and trial by jury, 112, 117
- Amendment 5. Taking private property for public use, 220, 229
- Article 2, sect. 2, clause 2. Receiving ambassadors and ministers, . . . 238
- Article 1, sect. 10. Impairing the obligation of a contract, 74, 220, 284, 297, 446, 449, 598
- Article 2, sect. 8, clause 8. Securing authors and inventors, 390
- Amendment 7. Preserving trial by jury in suits at law, 404, 554, 562
- Article 3, sect. 2. Cases in law and equity and cases of admiralty, . . . 403, 554, 560, 566
- Article 4, sect. 2, clause 3. Persons escaping from service, 594, 598
- Amendment 4. Security from seizures, searches for papers and in possessions, 590
- No warrant to issue without oath and probable cause, 590

CONSTITUTION OF UNITED STATES—CONTINUED.

Amendment 6. Accused shall be informed of accusation, &c.,	593
Article 4, sect. 2. The rights of citizens of the different states,	594
Amendment 2. Right to bear arms,	594
Article 6. The constitution the supreme law of the land,	512, 596
Article 1, sect. 2. Representation and direct taxes, how apportioned,	596
Article 2, sect. 1. Votes for president,	596
Article 5. Amendments, note,	597

CONSTITUTION OF STATES.

New Jersey powers of legislature not restrained by constitution,	74
Article 22. Trial by jury, when necessary,	222
Pennsylvania. Executive department,	429
Powers of government,	449
Trial by jury,	451, 452
Legislature of, may exercise judicial functions,	449
Article 9, sect. 8. Of bill of rights, security from unreasonable searches and seizures,	590
No warrant to issue without oath and probable cause,	590
Section 1. Of the bill of rights, enjoying and defending property,	594
Section 9. No man to be deprived of property,	<i>Id.</i>
Section 21. The right to bear arms in defence,	<i>Id.</i>
Section 26. Exceptions from the powers of government,	598

CONSTITUTIONAL LAW. *Vide* INJUNCTION.

The constitution of New Jersey confers general powers of legislation,	74
The legislature has power to regulate fisheries on the Delaware, by prohibiting the exercise of a common law right,	76
The only restraint upon them is, that they cannot, by any law, impair the obligation of a contract,	74
If a right is not founded in a contract, or secured by the constitution, it may be taken away by a state law, however long it may have been exercised,	75
This court can inquire only into the constitutional power of the legislature; not on the policy, justice, or wisdom of their acts,	76, 441, 442
An act of New Jersey incorporating a company to make a railroad, providing for the assessment of damages to the owners of land through which it passes, is not unconstitutional,	219
The right to take private property for public use, is an incident to all governments; but the obligation to make compensation is concomitant,	220
Though a law divesting vested rights, is not, <i>per se</i> , void, it is so if the right is by a contract, and compensation is not provided or made,	220
The constitution protects property against arbitrary seizure or divestiture; not by legal process and on compensation made,	221
The legislature may prescribe the process of taking property for the public use; also the mode of ascertaining compensation without trial by jury,	221
The twenty-second article, securing the right of trial by jury, applies only to criminal cases, and civil cases where a right is to be tried at law; not to mere collateral questions of damages, where no suit is pending, and the right of both parties admitted,	222

CONSTITUTIONAL LAW—CONTINUED.

- A law cannot authorize the taking private property for any other than public use, 222
 What are public and private corporations, 223
 The effect of an amendment to the constitution of the United States, 561, 598

CONSTRUCTION OF LAWS.

- Penal laws must be construed strictly to bring the case within the definition of the law, but not so as to exclude a case within its words, in their ordinary acceptation, 101
 Laws are construed strictly to save a right or avoid a penalty, and liberally to give a remedy or effect an object declared in the law, 316
 The provisions of a law which are merely directory are not to be construed into conditions precedent, 316
 Mercantile terms used in a law are to be taken in the sense intended, which is to be ascertained by the laws in *pari materia*, 505, 509
 The words of a law imposing a forfeiture or penalty shall not be construed to embrace a case not within the parts of the law which prohibit the act done, or direct the performance of an act, by the omission of which the penalty or forfeiture is incurred, 508

CONTRACT. *Vide* MARRIAGE CONTRACTS, &c.

- Jurisdiction of equity to enforce and rescind, 408, 409
 When not enforced, 487, 495
 How construed in cases of spoliation or suppression, 387
 Equity will not enforce a contract which is not definite and precise in its terms, or reform a written contract by a previous one by parol on the same subject; any variance will be presumed to have arisen from a change of intention, in the absence of fraud, mistake or accident, 486, 488, 495
 The writing must recite or refer to something by which to reform it, or there must be some matter of higher authority than the writing to authorize it, 489
 If a paper deliberately agreed upon to effect an object, fails to do so by the death of the party who was to do the necessary act, equity will not give a remedy by setting up a previous agreement, 490
 Obligation of, not to be impaired, 74, 220, 247, 284, 446, 449, 598
 When a contract for sale of goods is broken, 338
 When reformed in equity, 387, 489

CORPORATIONS. *Vide* INJUNCTION.

- The agents of a corporation may be sued in this court, though the corporation are not suable here, 216
 What are public and private corporations, 222
 A road, canal, &c., is for public use, when the public have a right of passage on paying a stipulated, reasonable, and uniform toll, whether it is constructed by the state or corporation. But if the toll amounts to a prohibition, it is a monopoly, and the road is not public, 223
 The declaration in the charter, that the Camden and Amboy Railroad is a public one, does not make it so, if the effect of the charter is to give the exclusive use to the corporation, 223

COURTS, JURISDICTION OF. *Vide* CASES. EQUITY. ADMIRALTY JURISDICTION.

COUNSEL FEES. *Vide* DAMAGES. TRUSTEE.

CRIMINAL LAW.

- The defendant was indicted for robbery and piracy on the high seas, on board a brig called "L'Eclair," a foreign vessel, belonging exclusively to French owners, and sailing under the French flag: *Held*, that under the acts of congress of the United States, this court has no jurisdiction to try and punish the offence, 25
- Whether the offence was committed within or without a marine league of the coast of the United States, is of no importance to the question of jurisdiction, 35
- On a joint indictment it is not a matter of right to have the defendants tried separately, but it is discretionary with the court, 81
- The United States may challenge a juror in the first instance peremptorily, till the panel is exhausted, after which they can only challenge for cause, 82
- It is a good cause of challenge that the juror has conscientious scruples about finding a verdict which may lead to capital punishment, 83
- If a juror is wrongly named on the panel he cannot be sworn, 83
- Where there are separate trials on a joint indictment, it is no cause of challenge that a juror was sworn on the first trial and found a verdict of guilty, though it is good cause to submit his indifference to triers, 84
- On a challenge for favour, without cause assigned, it will not be submitted to triers, *Id.*
- It is good cause for challenge if a juror does not stand indifferent on account of bias, prejudice, having made up his mind, or expressed an opinion touching the prisoner's guilt or innocence, *Id.*
- The word "rob" in the act of congress of 1825, sect. 22, is used in its common law sense, 93, 95
- "Jeopardy," as used in this section, means a well grounded apprehension of danger to life, in case of refusal or resistance, 94, 95
- Pistols are "dangerous weapons;" the offeror threat to shoot with them comes within the law, without proof that they were loaded—the presumption is they were loaded, 96, 97, 99, 106
- It is not necessary to a conviction under the twenty-second section, that the carrier of the mail should have taken the oath prescribed by the second section of the act of 1825, or that the whole mail be taken, 102, 105, 106
- All persons present at the commission of a crime, consenting thereto, aiding, assisting, abetting therein, or in doing any act which is a constituent of the offence, are principals, 102, 104, 106
- In an indictment for forgery, if there is a variance of a letter in any word, between the paper alleged to be forged and the indictment, the paper will be received in evidence, if the variance does not make another word, or one differing in sense and grammar, 293
- If it is doubtful, the meaning will be left to the jury, *Id.*
- An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States, *Id.*
- The scienter may be proved by the fact of similar forged orders found in possession of the defendant, or of an accomplice in passing them, 294

CRIMINAL LAW—CONTINUED.

- If there is a concert between two or more to pass counterfeit notes, or any joint or concurrent action in passing them, the act of one is evidence against the other, and the possession of counterfeit notes by one is the possession of the other, 295
- Passing a paper is putting it off in payment or exchange. Uttering it is a declaration that it is good, with an intention to pass, or an offer to pass it, 367
- The party accused of passing or uttering counterfeit paper, must be present when the act is done, privy to it, or aiding, consenting, or procuring it to be done. If done by consent, all are equally guilty, 367
- Passing a counterfeit note in the name of a fictitious person, an assumed name, or on a bank which never existed, is within the law. It is not necessary that the note, if genuine, would be valid, if on its face it purports to be good; the want of validity must appear on its face, 368
- The possession of other counterfeit paper by the defendant or a confederate at the time of passing counterfeit notes, is evidence of the sci-
enter, 294, 367, 368, 369
- An order or check drawn by the president of a branch bank of the bank of the United States, on the cashier of the bank at Philadelphia for the payment of money, is an "order or check" within the 18th section of the act chartering the bank, 371
- The bank is bound to pay such orders or checks, and the indictment may charge the passing such counterfeit order to be with the intent to defraud the bank, or the person to whom it is passed, 373
- The law presumes the intention in passing counterfeit paper to be to defraud any person who may suffer a loss by receiving it as genuine, 374
- Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness, not in swearing rashly and inconsiderately, according to his belief, 378
- It is no cause for a continuance that defendant has not been furnished with a copy of the indictment, and a list of the jurors, if he has not applied for them, 510
- In an indictment for forgery, defendant has no right to peremptory challenges, 511
- Good general character avails a defendant only in a doubtful case, 516
- Intoxication is no defence, if the defendant was possessed of his reason, and was capable of knowing whether the note he passed was good or bad, 517
- Where separate trials have been ordered on a joint indictment as the request of the prisoners and one has been convicted, a continuance will not be granted on account of any alleged excitement caused by the trial, 83, 84
- It is no cause for a continuance that defendant has not been furnished with a copy of the indictment, and a list of the jurors, if he has not applied for them, 510

DAMAGES.

- A person who holds goods in virtue of a respondentia bond, with an assignment of the bill of lading, may recover damages in an action of trespass against one who takes them unlawfully to the full value of the property, though it exceeds his debt due on the bond, 141
- If a marshal levies on the property of a third person, pursuant to instruc-

DAMAGES—CONTINUED.

- tions, without any abuse of his authority, he is liable only for the injury actually sustained, 143
- In such cases the rule of damages is the value of the goods, with interest from the time of taking them; or, if they are articles of merchandize, from the expiration of the usual term of credit on sales, 142, 143
- If an auction sale has become necessary in consequence of the levy, the plaintiff will be entitled to recover the expenses of such sale; also the amount of the premium for insurance against fire effected on the goods. But he is not entitled to recover for money paid counsel, or other expenses incurred in prosecuting the suit, 145
- Rule of damages in actions of trespass for taking goods, 143, 145
- In actions for infringement of patent rights, 323, 325
- In actions for not delivering goods sold, 338, 339
- In actions for assault and battery, 57

DECREE, IN CHANCERY.

- A final decree rendered against two defendants jointly, will not be set aside on motion, on account of the death of one of the defendants before the hearing, 288
- After the term in which a final decree has been rendered, it cannot be reversed, annulled or set aside, except by appeal or bill of review, 288

DEED, CONSTRUCTION OF.

- A, by deed, in 1766 conveyed the premises in question to his son M, and the heirs of his body lawfully begotten, and in default of such issue to the surviving sons and daughters of A, in the following shares and proportions; two shares to a son and one share to a daughter, and the heirs of their bodies respectively: and in case either of the sons or daughters die without issue, their shares to go to the survivors in the same proportions, and in default of issue of the survivors, to the right heirs of A. A had four sons and three daughters who survived him; they all died before M except one daughter. M died without issue in 1818, leaving a sister (the mother of the defendant), who survived him. Held, that the plaintiff, a son of a deceased brother of M, was not entitled to any share of the estate, his father having died before M, 200
- The remainder to the surviving sons and daughters of A was contingent, the words of survivorship referring to the death of M without issue, 200

DELAWARE RIVER.

- The proprietors of New Jersey had no right in the Delaware beyond low water mark, 72
- The right to the bed of the river was in the crown, therefore the compact of 1676 did not give a common right of fishery therein, 73
- The rights of the crown devolved on the states by the revolution, and were confirmed by the treaty of peace to them in their sovereign capacity, 73

DEMURRER. *Vide* BILL IN EQUITY.

DISCOVERY. *Vide* BILL FOR DISCOVERY. EQUITY JURISDICTION.

ELECTION. *Vide* LAND.

ELEGIT. How lands are taken on, 280

EQUITY JURISDICTION. *Vide* **CASES IN EQUITY.**

- The sixteenth section of the judiciary act is a declaratory act settling the law as to cases of equity jurisdiction, in the nature of a proviso, limitation, or exception to its exercise, 403
- If the plaintiff has a plain, adequate and complete remedy at law, the case is not a suit in equity under the constitution or the judiciary act, . . . 404
- There cannot be concurrent jurisdiction at law and in equity, where the right and remedy are the same, but equity may proceed in aid of the remedy at law by incidental or auxiliary relief, though not by final relief, if the remedy at law is complete. Its jurisdiction is special, limited and defined, not as in England where it depends on usage, 405
- A bill for discovery does not lie for matter of which plaintiff has knowledge and means of proof, or of matter whereof he has the same means of information as the defendant (as public records), 417
- If such bill is sustained, it does not give power to make a final decree, if relief is not incidental to the discovery, where nothing is disclosed by the answer, or the whole equity of the bill is denied, 408
- Though the rules and principles established in the English chancery at the revolution, are adopted in the federal courts, the changes since introduced there are not followed here, especially on matters of jurisdiction, as to which the sixteenth section is imperative, 409
- An objection to jurisdiction for the want of parties, of equity in the bill, or of there being a remedy at law need not be made by demurrer, plea, or in the answer, it may be made at the hearing, or on appeal, . . . 411, 416
- A bill for an account does not lie, where an account has been rendered and received, 418
- If an account is retained an unreasonable time without objection, it becomes in law and equity a stated or settled account, and a bar to an action or bill to account, 418
- A bill to account lies only when an action to account lies at law, and when the case comes under some appropriate head of equity jurisdiction, . . . 420
- It does not lie on an agreement to procure an assignment of judgments for the use of the plaintiff, when he has evidence of the agreement, and compensation for the breach can be had in damages, nor where there has been a great lapse of time in asking it, 419
- The staleness of a demand may be relied on at the hearing, though there is no plea, or demurrer, or the answer does not insist on it; equity acts by analogy, or rather in obedience to the statute of limitations on stale demands, 418, 419
- Equity has cognizance only of executory trusts, not of those executed, or where a trust can be enforced at law; there must be some act to be done by the trustee, 422
- A trust once executed cannot be revived by the non execution of a trust resulting from a subsequent agreement relative to the same subject, . . . 420
- An agency closed wholly or on any distinct matter, as to which no act remains to be done by the agent, is not cognizable in equity, under the head of account or trust, 423
- How equity interposes in odium spoliatoris, 380
- If a partner who has committed frauds on the firm agrees to indemnify the injured party to his satisfaction, by an assignment of all the partnership

EQUITY JURISDICTION—CONTINUED.

- effects for his indemnity, such assignment will be construed liberally in his favour, and will be reformed in equity so as to meet the intention of the parties in conformity with their agreement, 386
- But the injured party will not be allowed to be the judge of his indemnity, 388
- As a trustee he will be confined to such satisfaction as a court of equity deem reasonable, 388
- If the books and papers of the firm have been destroyed or suppressed, false entries made in them, or no entries made by the partner who has charge of them to his debit, with a view to fraud, the injured partner may support a specific charge by his own affidavit, but not by one which specifies no amount under any particular item, 389, 390, 392
- On a bill by the fraudulent partner for an account, the master may charge him on any evidence which is competent or admissible as proof of the item; he cannot hold the injured partner to such degree of proof, as would justify a charge under ordinary circumstances, against a customer or partner; there must however be some proof, 391

EVIDENCE. *Vide* SALE OF GOODS.

- On an indictment for robbery and piracy, evidence may be given of the whole transaction, though there is a separate indictment against the prisoner for a murder committed at the same time, 16
- Testimony of an accomplice, how to be regarded, 21
- In an action of assault and battery to which the general issue is pleaded, the defendant may give in evidence his state of mind, caused by an excitement or provocation so recent or immediate, as not to allow the blood to cool, 58, 59
- The legal effect of such evidence is not to excuse the defendant from paying compensatory damages, but will excuse him from paying such as are exemplary, 59
- If the alleged provocation is a previous assault and battery by the plaintiff of the son of the defendant, evidence of the transaction is not admissible; but the defendant may give in evidence the appearance of the son, and the account he gave to the defendant at the time he first saw him, so as to enable the jury to decide on the cause and extent of the provocation, 59
- It is no objection to the competency of a witness, that a reward has been offered to be paid on conviction of the prisoner, to which witness may be entitled, 90
- The admissions of a prisoner, though they are not in writing or given in his words, are admissible; but the whole of a connected conversation on the subject must be given, 90
- A pardon granted by a governor of a state, under its great seal, is evidence, *per se*, without any further proof, 91
- The evidence of an accomplice cannot be corroborated by his statements at another time, unless it has been impeached, 91
- The acts of a co-defendant are evidence to show the connection between him and the prisoner in the same offence, 91, 92
- After a witness has been once examined, it is in the discretion of the court to permit him to be examined again on new matter, but not a matter of right, 92
- A certificate by the secretary of state, under seal of office, that a person has been recognised by the department of state as a foreign minister, is

EVIDENCE—CONTINUED.

- full evidence that he has been authorized and received as such by the president of the United States, 238
- A party taking out a commission to take evidence in relation to pedigree, is not bound to name the witnesses he intends to examine, 291
- If the deposition of a witness who is attending in court is read without objection, he may be examined in chief by the party who read his deposition, 305
- The declarations of the debtor are not evidence to defeat the title of the grantor, under a conveyance alleged to be fraudulent, 357
- On the trial of an indictment for passing counterfeit notes, evidence may be given of the defendant passing similar counterfeit notes, in order to prove the knowledge that the note in question was counterfeit. So the passing of notes of a different bank at the same time, or of having them in his possession at the time. But if the indictment is for passing a counterfeit note of the bank of the United States, evidence of passing a counterfeit note of another bank, at another time, is not admissible, or if given without objection a jury will not consider it, 514
- On an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity, and the delivery of one note; parol evidence of the contents of a letter to an accomplice from the defendant on the subject of counterfeit notes, for which the accomplice could not account and had not searched, but believed he has lost, is admissible. If the letter to which it is an answer is in the hands of the defendant, it need not be produced or notice given to the defendant to produce it, before evidence is given of the contents of the answer, 590
- The law presumes that an accomplice would destroy a letter which would implicate him, and no search is necessary in order to admit secondary evidence, 591
- In forgery no notice is necessary to produce a paper in the hands of the defendant, an accomplice, or a third person who secretes it to protect the defendant, or that evidence of its contents will be offered at the trial, though such paper is not the subject of the indictment, 592
- If the original would be evidence of the scienter, as to the note laid in the indictment, the law presumes notice that all competent evidence relating to it will be offered, 595
- After evidence that a note of the description laid in the indictment had been forged and passed, evidence may be given of delivering or passing other counterfeited notes on the same bank before or after the passing the one in question, 596
- The time which elapses between the two acts is not material as a matter of law, but of fact for the jury to draw the inference of the scienter, the presumption being weaker from the length of time, 597
- On a question of slavery or freedom, the same rules of evidence prevail as in other cases concerning the right to property, 577
- Parol evidence to vary a contract, 488
- On what evidence a contract will be reformed in equity, 489

EXECUTION. *Vide* MARSHAL'S AND SHERIFF'S SALE.**FALSE IMPRISONMENT.**

It is false imprisonment to detain another by threats of violence to his per-

FALSE IMPRISONMENT—CONTINUED.

son, or deprive him of the freedom of going where he will by the well grounded apprehension of personal danger, though no assault is committed, 600, 601

FISHERIES IN THE DELAWARE.

The compact between New Jersey and Pennsylvania recognises the right of fishery in riparian owners on the Delaware, 70
 The third section of the act of 1808, defining a fishing place, applies only to shore fisheries: a common right of fishery is necessarily indefinite, *Id.*
 The penalties of the law of 1822 attach to any person who uses a gilling seine or drift net on the Delaware, unless he has the right of fishing on the opposite shore, *Id.*
 An entry under this law by a person claiming only by common right is void, 71
 The act of 1822 is not repugnant to the constitution of the United States, *Id.*
 The proprietors of New Jersey had no right in the Delaware beyond low water mark, *Id.*
 The right to the bed of the river was in the crown, therefore the compact of 1676 did not give a common right of fishery therein, 73
 The legislature has power to regulate fisheries on the Delaware, by prohibiting the exercise of a common law right, 76
 The only restraint upon them is, that they cannot, by any law, impair the obligation of a contract, 74
 Neither the state or federal constitution secures a common right of fishery in the Delaware to the people of New Jersey, 76

FORGERY. *Vide* CRIMINAL LAW.

FRAUD AND FRAUDULENT CONVEYANCE. *Vide* MARRIAGE.

What is deemed fraud in the sale of goods (*Vide* SALE OF GOODS), 336
 To make a contract void under the 13th Eliz., for fraud against creditors, both parties must concur in the fraud, 357
 The declarations of the debtor are not evidence to defeat the title of the grantor, under a conveyance alleged to be fraudulent, 357
 A contract or conveyance, in consideration of a future marriage, is within the sixth section of the statute of 13 Eliz., if bona fide and without notice of fraud, &c., 358
 Marriage is a consideration as valuable as money, if bona fide, &c., 358
 If a contract before marriage could be enforced at law or in equity, the voluntary performance by the husband is as valid as if done under a judgment or decree, and is good against creditors who have no lien, 359
 Where by the marriage articles the husband was to erect a house and furnish it as he thought fit, an indiscreet expenditure for furniture is not, per se, fraudulent against creditors, unless it is so extravagant as at first blush to indicate a fraudulent motive, the creditors of the husband may take the excess, 364
 Where the sum stipulated by articles before marriage has not been made up, the husband may do it afterwards on the eve of a judgment against him, if done in performance of the articles, or so accepted by the trustee, 364
 A receives goods from B and C, on an agreement that A should take them

EVIDENCE—CONTINUED.

- full evidence that he has been authorized and received as such by the president of the United States, 238
- A party taking out a commission to take evidence in relation to pedigree, is not bound to name the witnesses he intends to examine, 291
- If the deposition of a witness who is attending in court is read without objection, he may be examined in chief by the party who read his deposition, 305
- The declarations of the debtor are not evidence to defeat the title of the grantor, under a conveyance alleged to be fraudulent, 357
- On the trial of an indictment for passing counterfeit notes, evidence may be given of the defendant passing similar counterfeit notes, in order to prove the knowledge that the note in question was counterfeit. So the passing of notes of a different bank at the same time, or of having them in his possession at the time. But if the indictment is for passing a counterfeit note of the bank of the United States, evidence of passing a counterfeit note of another bank, at another time, is not admissible, or if given without objection a jury will not consider it, 514
- On an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity, and the delivery of one note; parol evidence of the contents of a letter to an accomplice from the defendant on the subject of counterfeit notes, for which the accomplice could not account and had not searched, but believed he has lost, is admissible. If the letter to which it is an answer is in the hands of the defendant, it need not be produced or notice given to the defendant to produce it, before evidence is given of the contents of the answer, 520
- The law presumes that an accomplice would destroy a letter which would implicate him, and no search is necessary in order to admit secondary evidence, 521
- In forgery no notice is necessary to produce a paper in the hands of the defendant, an accomplice, or a third person who secretes it to protect the defendant, or that evidence of its contents will be offered at the trial, though such paper is not the subject of the indictment, 522
- If the original would be evidence of the scienter, as to the note laid in the indictment, the law presumes notice that all competent evidence relating to it will be offered, 525
- After evidence that a note of the description laid in the indictment had been forged and passed, evidence may be given of delivering or passing other counterfeited notes on the same bank before or after the passing the one in question, 526
- The time which elapses between the two acts is not material as a matter of law, but of fact for the jury to draw the inference of the scienter, the presumption being weaker from the length of time, 527
- On a question of slavery or freedom, the same rules of evidence prevail as in other cases concerning the right to property, 577
- Parol evidence to vary a contract, 488
- On what evidence a contract will be reformed in equity, 489

EXECUTION. *Vide* MARSHAL'S AND SHERIFF'S SALE.**FALSE IMPRISONMENT.**

It is false imprisonment to detain another by threats of violence to his per-

FALSE IMPRISONMENT—CONTINUED.

son, or deprive him of the freedom of going where he will by the well grounded apprehension of personal danger, though no assault is committed, 600, 601

FISHERIES IN THE DELAWARE.

The compact between New Jersey and Pennsylvania recognises the right of fishery in riparian owners on the Delaware, 70
 The third section of the act of 1808, defining a fishing place, applies only to shore fisheries: a common right of fishery is necessarily indefinite, *Id.*
 The penalties of the law of 1822 attach to any person who uses a gilling seine or drift net on the Delaware, unless he has the right of fishing on the opposite shore, *Id.*
 An entry under this law by a person claiming only by common right is void, 71
 The act of 1822 is not repugnant to the constitution of the United States, *Id.*
 The proprietors of New Jersey had no right in the Delaware beyond low water mark, *Id.*
 The right to the bed of the river was in the crown, therefore the compact of 1676 did not give a common right of fishery therein, 73
 The legislature has power to regulate fisheries on the Delaware, by prohibiting the exercise of a common law right, 76
 The only restraint upon them is, that they cannot, by any law, impair the obligation of a contract, 74
 Neither the state or federal constitution secures a common right of fishery in the Delaware to the people of New Jersey, 76

FORGERY. *Vide* CRIMINAL LAW.

FRAUD AND FRAUDULENT CONVEYANCE. *Vide* MARRIAGE.

What is deemed fraud in the sale of goods (*Vide* SALE OF GOODS), 336
 To make a contract void under the 13th Eliz., for fraud against creditors, both parties must concur in the fraud, 357
 The declarations of the debtor are not evidence to defeat the title of the grantor, under a conveyance alleged to be fraudulent, 357
 A contract or conveyance, in consideration of a future marriage, is within the sixth section of the statute of 13 Eliz., if bona fide and without notice of fraud, &c., 358
 Marriage is a consideration as valuable as money, if bona fide, &c., 358
 If a contract before marriage could be enforced at law or in equity, the voluntary performance by the husband is as valid as if done under a judgment or decree, and is good against creditors who have no lien, 359
 Where by the marriage articles the husband was to erect a house and furnish it as he thought fit; an indiscreet expenditure for furniture is not, per se, fraudulent against creditors, unless it is so extravagant as at first blush to indicate a fraudulent motive, the creditors of the husband may take the excess, 364
 Where the sum stipulated by articles before marriage has not been made up, the husband may do it afterwards on the eve of a judgment against him, if done in performance of the articles, or so accepted by the trustee, 364
 A receives goods from B and C, on an agreement that A should take them

FRAUD AND FRAUDULENT CONVEYANCE—CONTINUED.

- for sale from place to place, to pay the invoice price for such as were sold, to return those unsold and be credited with the amount at the prices charged, A to receive the surplus of what was sold over the invoice price. Held: that such agreement is not fraudulent in law, if not so in fact, 532
- That B and C could recover in trover for taking them, if the contract was not fraudulent, 529
- A and M, were partners when the goods were invoiced, before the contract, M sold his interest in the partnership effects to B, held that A and B could sustain the action, 535
- Reputed ownership in A, under such a contract, does not justify a creditor of A in taking the goods, unless under the statutes of bankruptcy, . . . 533
- Possession of goods by any other than the real owner, is neither fraudulent or a badge of fraud, if the want of possession is fairly accounted for, and there is no fraud in fact, 533, 534
- Fraud committed by partner on the firm, 380

FOREIGN MINISTER.

- Any person who executes process on a foreign minister is to be deemed an officer under the twenty-sixth section of the act of 1790, 240
- To support an indictment under this law it is not necessary that the defendant should know the person arrested to be a foreign minister, 240
- A foreign minister cannot waive his privileges or immunities, his submission or consent to an arrest is no justification, 239
- An assault committed by him may be repelled, in self-defence, but does not justify an arrest on process, 240
- An attaché to a foreign legation is a public minister within the act of congress, 239

FUGITIVE SLAVE. *Vide* SLAVE.

GRANDCHILDREN. When not considered as children, 201, 203

HANDWRITING. What is evidence of, 49

HUSBAND AND WIFE. *Vide* LEGACY. MARRIAGE CONTRACT.

- IMPRISONMENT.** Defined, 239, 600
- It is false imprisonment to detain another by threats of violence to his person, or deprive him of the freedom of going where he will by the well grounded apprehension of personal danger, though no assault is committed, 600, 601

INDICTMENT.

- An indictment laying an offence in the words of the law creating it is sufficient, as a general rule, 119
- It need not state the county in which the offence was committed; it is enough if it shows that the court had jurisdiction: cases of treason are exceptions, 115, 122
- An indictment under the twenty-seventh section of the act of 1790 need not state the offence to be committed by an officer. It is sufficient to

INDICTMENT—CONTINUED.

state that the person on whom it was committed was a public minister, without stating that he had been authorized and received as such by the president. This section applies to all public ministers, . . . 242

INJUNCTION.

General cases for granting injunctions, . . . 217

It is no objection to an injunction that the defendant acts under the authority of a law, if he exceeds or abuses his power, or if the law is unconstitutional. But it will not be granted if there is a reasonable doubt of the validity of the law or the proper exercise of the power it confers; nor where there is a discretionary power given and exercised with judgment, and within the line prescribed; a party complaining will be referred to his remedy at law, or the special tribunal created by the law which gives the authority to do the act, . . . 218, 219

A road, canal, &c., is for public use, when the public have a right of passage on paying a stipulated, reasonable, and uniform toll, whether it is constructed by the state or corporation. But if the toll amounts to a prohibition, it is a monopoly and the road is not public, . . . 223

The declaration in the charter, that the Camden and Amboy Railroad is a public one, does not make it so, if the effect of the charter is to give the exclusive use to the corporation, . . . *Id.*

If it is not clear that the use is private, an injunction will not be granted, . . . *Id.*

Under a charter to construct a railroad from Camden to Amboy, with liberty to make a lateral road to Bordentown, and no route designated between Camden and Amboy, an injunction will not be granted, merely because the main road goes through Bordentown. The corporation must confine themselves to the route prescribed, but if there is a discretion not clearly abused, the court will not interfere by an injunction, . . . 224

If the corporation has encroached on any public right at Bordentown, or usurped a franchise at a place not authorized by the charter, it is a proper case for the state to interfere by indictment or quo warranto in a state court. But an individual is not entitled to an injunction against the taking his land for the road, if by any reasonable construction of the charter, there is a power to locate the road through it, . . . *Id.*

Where the charter authorizes an entry on land for the purpose of locating the road, and directs the location to be made, and a survey of the route of the road to be deposited in the office of the secretary of state; and when the location is determined on and the survey so deposited, the corporation may take possession of such land, use and occupy it for the construction of the road. The location, and deposit of the survey, are conditions precedent to their authority to enter for the purpose of constructing, and their entry for such purpose is a proper subject for an injunction, if the condition is not performed. An entry on private property, for the mere purpose of locating a road, is not taking it, this power may be given by law without compensation other than for any injury done to it, as the right remains in the owner. But where the divestiture of the owner's right is claimed, and its transfer is necessary for public use by a permanent appropriation of the soil, compensation must be made, . . . *Id.*

A law which directs the taking private property for public use, is not void

INJUNCTION—CONTINUED.

- because it contains no provision for compensation, or the mode of ascertaining it, the law is valid if this is done by a subsequent law, . . . 226, 229
- But the execution of the law will be enjoined, till such provision is made by law, and the compensation paid, . . . 227
- The payment must be simultaneous with the disseisin of the owner, and the appropriation of his property. The owner must not be put to his remedy. But, *semb.*, if the compensation is ascertained, its payment certain, the security undoubted, and the means of collection summary, the construction of the road may be *begun* before actual payment, . . . 227
- The kind of injury impending, and the degree of its danger as a ground for an injunction, considered, . . . 230
- This case a proper one for an injunction, . . . 233

INQUISITION. When necessary, when not, . . . 268, 270, 443

INSOLVENT LAWS OF STATES AND BANKRUPT LAWS.

- The plaintiff sold to the defendant certain goods in Philadelphia, and at the same time delivered to him other goods to be disposed of at Havanna, on account of the plaintiff. The defendant took all the goods to Havanna and there pledged them as a security for money advanced to him; on his return to Philadelphia, this suit was commenced against him. This action was on the case, but no declaration was filed. So it stood when a judgment was entered generally; afterwards, by an agreement between the parties, the judgment was confessed on the record to be for a certain sum, and notes were taken for the amount, payable at distant periods, and execution stayed accordingly. After these arrangements were made, the defendant was duly discharged by the insolvent laws of Pennsylvania, and after his discharge, the plaintiff filed his declaration in the above suit in trover, and charged the defendant with a tortious conversion to his own use, of the goods in both invoices; the alleged tort was the pledging of the goods at Havanna. If on these facts the plaintiff had originally an election to bring his suit on the contracts or for a tort, yet as it clearly appears by the whole course of proceeding that he had proceeded upon the contracts, he cannot, by filing under these circumstances a declaration in trover, turn his suit into one for a tort. The contract and promises having been made in Philadelphia, by persons resident here, and to be executed here, the rule for the exoneration was made absolute, . . . 14
- O. W., residing in New York as the agent of T. N., who had gone to England, put into the hands of the defendants in Philadelphia a quantity of tin to be sold. On the 13th of March the defendants, by letter, informed O. W. that they had sold three hundred boxes, net amount 2569 dollars 72 cents, "for which you can value on us, payable on the 19th instant." On the 15th of the same month O. W. drew the bill in question. It appeared that before the bill was drawn, T. N. had become bankrupt in England. The defendant gave in evidence certain attachments laid on the property of T. N. in his hands. Held, that the above letter did amount to an acceptance of the bill drawn in conformity with it. That the bankruptcy of T. N. did not revoke the power of his agent to draw the bill without notice, . . . 38

**INSOLVENT LAWS OF STATES AND BANKRUPT LAWS—con-
TINUED.**

- A discharge by the bankrupt law of a foreign country, does not operate to pass the property or discharge the person of a debtor here, 45, 300
- The states of this union are foreign to each other for all purposes not embraced in the constitution of the United States, 299, 300
- A discharge of a debtor under the insolvent law of Pennsylvania, does not protect him from arrest by a citizen of New York, for a debt payable in New York, or to a citizen of that state, 301
- Insolvent laws of a state have no effect beyond the limits thereof, 300
- A state may pass a bankrupt law if there is no act of congress in force establishing an uniform system of bankruptcy, and it does not impair the obligation of a contract, 297, 303
- State laws discharging a person from his liability on contracts made previously to the law, are unconstitutional and void, 297
- It makes no difference whether the parties are citizens of the same or of different states, 298
- The law is the same whether the suit on the contract is in a state court or a court of the United States, 300, 301
- A contract may be discharged by a state law enacted before the contract was made, 298, 301
- The discharge of the person from imprisonment by a state law is valid, as imprisonment is a remedy to enforce the contract, but not a part of its obligation, 297, 301
- If the creditor makes himself a party to the proceedings in a state court, on the discharge of the debtor under a state law discharging both the person and property of the debtor, the discharge is valid 301
- (*Vide* FRAUD AND FRAUDULENT CONVEYANCES.)

INTEREST.

- An account current received and not objected to in a reasonable time becomes a settled account, bearing interest from the time it is stated, and the balance is payable on demand, 538
- An account made up of principal and interest becomes one principal debt when settled, the aggregate balance bearing interest, 540
- Compound interest is not illegal, and may be recovered on an express promise, or one implied by law, as a part of the contract, 541
- If an account contains a charge of interest during a war, it is recoverable if there is a promise to pay the account after peace, or the account is in fact or law a settled account, from which the promise results by operation of law, 542
- Cases where interest is payable by the law of England, 538, 539
- Where the allowance of interest is a question for the court or the jury, 539, 542

JUDGMENT. *Vide* MARSHAL'S SALE.

- "*Nil debet*" is not a good plea to an action brought in this court to a judgment obtained in the circuit court of the United States for the district of Delaware, 36, 37
- An affidavit of merits is not necessary on a motion to set aside a judgment by default irregularly entered. When the counsel of a defendant in ejectment requested the clerk to enter his appearance, who promised to do it, a subsequent judgment by default on a rule to plead in twenty days is irregular, 462

JUDGMENT—CONTINUED.

Lien of judgments,	273
Sale under younger judgment,	278

JURISDICTION OF CIRCUIT COURTS. *Vide* EQUITY. ADMIRALTY.

The defendant was indicted for robbery and piracy on the high seas, on board a brig called "L'Eclair," a foreign vessel belonging exclusively to French owners, and sailing under the French flag; <i>Held</i> , that under the acts of congress of the United States, this court has no jurisdiction to try, and punish the offence,	25
Whether the offence was committed within or without a marine league of the coast of the United States, is of no importance to the question of jurisdiction,	35
A citizen of New York obtained a judgment against a citizen of Pennsylvania in a court of the state, which the plaintiff assigned to a citizen of Pennsylvania, whose executors assigned it to the complainant, an alien. <i>Held</i> , that he could sustain a bill in equity in this court notwithstanding the intermediate assignment to a citizen of Pennsylvania,	135
This court has jurisdiction of an action of debt on a judgment obtained in a state court obtained by a citizen of another state,	543

JUDICIAL POWER,	403, 449, 554, 562
---------------------------	--------------------

JURY, CHALLENGES TO. *Vide* CRIMINAL LAW.

In a criminal case a jury are so far judges of the law, that they may find a verdict according to their own opinion; but they are as much morally and legally bound by the law as the court. If they acquit against law, the court cannot set aside their verdict; but if the jury convict against law, no sentence will be passed by the court,	99, 101, 108, 109
The constitutionality of the charter of the Bank of the United States is not a proper subject for the consideration of the jury,	511
The construction of the constitution of the United States by the supreme court is binding on a jury as well as the court,	513
If a special jury list has been struck by the parties before the marshal, and the list has been lost by him, so that no venire had issued, the court will direct the striking anew from the same list, and a venire to issue returnable ten days thereafter during the term,	126

JUSTICE OF PEACE.

Cannot grant a warrant on Sunday for an act which is no breach of the peace,	585
If he issues an order or warrant of arrest contrary to the provisions of the constitution, or for a matter over which he has no jurisdiction, and the party is arrested, the justice is answerable in an action of trespass, 591, 601, 602	

LAND.

When considered as money in equity. <i>Vide</i> LEGACY.	
It is no exception to the rule, that land directed to be sold and turned into money is considered as money from the death of the testator, because the period of sale is remote, and the conversion cannot be made till the time arrives,	184, 185
The rule applies to a bequest of the proceeds of the land to a residuary	

LAND—CONTINUED.

- legatee, unless he has made an election to consider the proceeds as land ;
 none but the first taker can make an election, 186
 Such election cannot be by any person who is not entitled to the whole
 surplus, *Id.*
 There is no resulting trust to the heir, when all the bequests in the will
 take effect, *Id.*
 Sale of land under an execution. *Vide* MARSHALS' SALES.

LAWS. *Vide* ACTS OF ASSEMBLY. CONSTRUCTION OF STATE LAWS.

LEGACY.

- Where a testator by his will devised his real estate to his executors, and
 directed them to apply the rents and profits to specific purposes until the
 happening of a certain event, and then to sell it, and divide the proceeds
 among certain residuary legatees : Held, that the real estate is in equity
 to be considered as money, from the death of the testator, for all the pur-
 poses of the will, 172, 173
 If any of the residuary legatees who were alive, and capable of taking at
 the death of testator, die before the time of sale, their shares go to their
 next of kin as personal property, 174, 175
 Where a testator gave special legacies to the same persons who were re-
 siduary legatees, and then gave the residue of his estate to the legatees
 to be divided between them according to their several legacies : Held,
 that the residuary legacies were vested, and on the death of any of the
 legatees before the time of distribution, became payable to their repre-
 sentatives, 175
 If the proceeds of land devised to be sold are given to a feme covert, who
 dies before there can be a sale, the legacy is vested, the right to it devolves
 on her husband ; and if he also dies before the sale, it goes to his repre-
 sentative, and not to the next of kin of the wife, 187

- LEVY.** On goods, 266
 On land (*Vide* MARSHALS' AND SHERIFFS' SALES), 268

LEX LOCI.

- The validity of a contract depends on the law of the country where it is
 made, unless it is to be performed elsewhere, 130
 The forms of execution are governed by the local law where it is made, 130
 But when it is made with reference to the performance of an act in another
 country, which is regulated by its laws, it must be executed with the for-
 malities required where it is to be performed (*Vide* BONDS), 131
 A residing in Philadelphia, consigned goods to B residing in New York,
 and drew his bill on B, promising to pay the balance which might be
 due after the sale of the goods, if the proceeds did not reimburse B the
 amount of the bill. B accepted and paid the bill, which exceeded the
 amount of sales : Held, that A was bound to reimburse B at New York, 302
 Where bills are accepted payable in London on a promise to provide funds
 to meet them, the contract is governed by the law of England, 537
 The obligation and rights of the parties to a contract are governed by the
 law of the country where the contract is to be executed, 302, 537
 The remedies to enforce a contract are governed by the law of the country
 in which the suit is brought, 538

LIEN. Of an execution,	266
Of a judgment,	268, 273

LIMITATION OF ACTIONS. *Vide* ACCOUNT.

If the statute of limitations is pleaded, and plea overruled, it cannot be again put in by the same parties or their privies,	193
Acts of limitation do not apply directly to suits in equity, but courts of equity adopt them by analogy, and act in obedience to them,	419
The effect of time and acquiescence as a limitation,	418, 419
Limitation of the lien of a judgment,	273

MASTER AND SERVANT (<i>Vide</i> SLAVE),	577
--	-----

MARRIAGE AGREEMENTS, CONTRACTS AND SETTLEMENTS.

A contract or conveyance, in consideration of a future marriage, is within the sixth section of the statute of 13 Eliz., if bona fide and without notice of fraud, &c.,	358
Marriage is a consideration as valuable as money, if bona fide, &c.,	358
If a marriage contract is executed, the wife is a purchaser, and the contract is valid though the husband was in debt at the time,	359
If the contract is executory, she is a creditor till it is performed,	359
If part executed, she is pro tanto a purchaser, and a creditor for the residue,	359
The husband has the same right to prefer his wife in completing a settlement pursuant to articles before marriage as he has to prefer any other creditor,	360
Whether her position is as a purchaser or creditor, her rights are the same as purchasers for money, or creditors by bond,	360
Her trustee is the purchaser or creditor at law, and she in equity,	360
If a contract before marriage could be enforced at law or in equity, the voluntary performance by the husband is as valid as if done under a judgment or decree, and is good against creditors who have no lien,	359
The consideration of marriage being deemed valuable, a court of law will not estimate it in comparison with the settlement, equity may do it,	361
After the marriage, the marriage articles will not be presumed to have been abandoned by any delay or negligence of the trustee in their execution,	363
A covenant in the marriage articles by the father of the intended wife, to stand seised to her use, after marriage, of a piece of real estate, does not operate after marriage, to pass the legal estate by the statute of uses, 27 Hen. 8, the use remains executory in the trustee and his heir at law,	363
Where by the marriage articles the husband was to erect a house and furnish it as he thought fit, an indiscreet expenditure for furniture is not, per se, fraudulent against creditors, unless it is so extravagant as at first blush to indicate a fraudulent motive, the creditors of the husband may take the excess,	364
Where the sum stipulated by articles before marriage has not been made up, the husband may do it afterwards on the eve of a judgment against him, if done in performance of the articles, or so accepted by the trustee,	364
Marriage articles are not affected by not being recorded within the time prescribed by the laws of New Jersey,	365
Equity will not enforce a contract which is not definite and precise in its terms, or reform a written contract by a previous one by parol on the	

MARRIAGE AGREEMENTS, CONTRACTS AND SETTLEMENTS—

CONTINUED.

- same subject; any variance will be presumed to have arisen from a change of intention, in the absence of fraud, mistake or accident, 486, 488, 495
- The writing must recite or refer to something by which to reform it, or there must be some matter of higher authority than the writing to authorize it, 489
- If a paper deliberately agreed upon to effect an object, fails to do so by the death of the party who was to do the necessary act, equity will not give a remedy by setting up a previous agreement, 490
- A party must rely on the case stated in his bill or answer; if he sets out a contract in writing, he cannot recover on a verbal one not set up in the bill or answer, 491
- Equity will not construe a marriage contract differently from its terms, in favour of the parties to the marriage, though they would do it in a similar case in favour of the issue, 489
- By an agreement in consideration of an intended marriage, the portion of the wife was to be raised out of her real estate of which her father was tenant by the curtesy, by a sale after she arrived at twenty-one; the marriage took effect; the wife attained twenty-one, and died two months afterwards, without any act done by her towards the completion of the settlement, or any request by the husband to the father to have it done. Held, 492, 496
- That as the act must be a concurrent one, the party who claims a remedy for non performance must aver and prove performance, or an offer and readiness to perform, on his part, 493
- That where no time is fixed in the contract, the party desirous of performance must hasten it by a request. That none being made after the wife came of age, the father or his estate was not liable for the non performance, 494, 498

MARSHAL. Rule of damages in suits against, 142, 146

MARSHALS' AND SHERIFFS' SALES.

- Where a levy and inquisition were set aside by the court, but the fieri facias not set aside, a new inquisition was held and returned with the fieri facias and levy annexed, condemning the property; a venditioni exponas was issued, the property sold and deed acknowledged by the marshal in open court: *Held*, that the validity of the sale was not affected by the want of an alias fieri facias, or a new levy, 266
- The acknowledgement of a sheriff's or marshal's deed is a judicial act, which cures all defects in process or its execution, which the court have power to remedy by their order, 272
- If the court has jurisdiction of the case, the parties, and power to order the sale by a venditioni exponas, a sale so made, and a deed acknowledged, cannot be set aside in a collateral action, 271
- An objection to such sale must show the want of power in the court, 272
- Irregularities must be corrected by the court which issues the process, 271
- Erroneous proceedings must be reversed on a writ of error, or they are binding, 271
- The state law of 1798, limiting the lien of judgments, is a law of property

MARSHALS' AND SHERIFFS' SALES—CONTINUED.

- and title applicable to judgments in this court, of record before its passage, 273
- This act does not admit of the same construction as the statute of Westminster, giving a scire facias after a year and a day, there being no analogy between them as to the mischief or remedy, 275
- A capias ad satisfaciendum taken out and returned non est inventus, does not preserve the lien of a judgment without a scire facias within five years from its entry, 276
- As a general principle, an elder judgment is entitled to prior satisfaction; a sale under a younger judgment does not affect the prior one, or prevent a sale under it so as to pass the title; and if the question was open, this court would give such construction to the fourth section of the state law of 1705, 278, 284
- But the rule established by the supreme court of this state is otherwise, and will be adopted as the construction of a state law: Therefore, held: That a sale by a sheriff, under a judgment in the court of common pleas in this state, passes a title to the purchaser discharged from a prior judgment in this court, either against the defendant, as whose property it was sold, or against any persons from whom it was conveyed to the defendant, 284

- MERCANTILE TERMS.** In a law, how construed, 504, 505
- In mercantile instruments they are taken in their mercantile sense, 504

NON EST FACTUM.

- After a cause has been at issue eighteen months leave will not be given to a defendant to plead non est factum without affidavit denying the execution of the bond, 463

NOTICE.

- Of inquisition, 270
- To a debtor to the state to settle accounts, 435
- When notice to a justice of the peace is necessary before suing him, 602

OFF-SET. *Vide* ADMIRALTY.**ORPHANS' COURT SALES, 282, 283****PIRACY. *Vide* CRIMINAL LAW.****PERJURY. *Vide* CRIMINAL LAW.****PRACTICE. *Vide* AMENDMENT. JUDGMENT BY DEFAULT.**

- The court will not dismiss a bill for want of proceeding in the cause for three terms, without giving one term's notice of the application for dismissal, 132

PRINCIPAL AND ACCESSARY. *Vide* CRIMINAL LAW.**PRINCIPAL AND AGENT.**

- The mere relation of agent and principal between parties does not give

PRINCIPAL AND AGENT—CONTINUED.

- jurisdiction in equity unless the case comes under some appropriate head of equity jurisdiction, 421, 422
- Where a special agency has been closed by the parties, either wholly or as to any particular transaction, it is a matter cognizable at law if the transactions are distinct, 423
- The possession of goods by an agent is the possession of the principal, . . . 533
- The goods of a principal in the hands of his agent or factor cannot be taken in execution or attached for the debts of the latter, 534
- So where goods are delivered under a special contract of consignment, for their sale or return on terms stipulated, if the contract was not affected with fraud in fact or law (*Vide FRAUD*), 534
- An agent or factor who accepts bills on a promise to provide funds to meet them must be put in the same situation as if they had been provided. The reimbursement must be at the place of acceptance of the bills, . . . 538

PROCESS. As of congress for regulation of, 274, 563

REVENUE. Laws relating to collection of, 139, 140, 504

REMAINDER. When vested or contingent (*Vide DEED*), 202

ROBBERY. *Vide CRIMINAL LAW.*

SALE OF GOODS.

- On the 7th of April, A sold B a quantity of coffee "provided it is not sold in New York:" Held, that the sale to B was absolute, if the coffee had not then been sold; the proviso does not refer to a future sale, 336
- A purchaser of goods is not bound to answer the inquiries of a seller respecting the state of the market, 337
- If after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it on a condition which he has no right to exact, he thereby waives the fraud and cannot set it up in an action on the contract, 338
- What is fraud in a purchaser of an article of merchandize, considered, 336, 337
- Where no time is fixed for delivery of goods sold, the law makes them deliverable in a reasonable time: if when a demand is made there is no objection made as to time, or it was not then made a question by the vendor, the contract will be deemed to be broken by a refusal, 338
- The rule of damages is the market price of the goods at the time when they were deliverable, a jury cannot give damages beyond the market value, though the refusal to deliver may have been with a view to profit. But if the price was not fixed, and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate, according to the conduct of the defendant, 338
- A receives goods from B and C, on an agreement that A should take them for sale from place to place, to pay the invoice price for such as were sold, to return those unsold and be credited with the amount at the prices charged, A to receive the surplus of what was sold over the invoice price. Held: that such agreement is not fraudulent in law, if not so in fact, 532
- The goods were put up in New York, and brought to this state for sale,

SALE OF GOODS—CONTINUED.

- where they were attached by the creditors of A, for debts due before the agreement. A returns to New York, returns the invoices and abandons the goods to B and C, who rescinded the contract. Held:
- That A was a competent witness in an action for taking the goods, . . . 529
- That B and C could recover in trover for taking them, if the contract was not fraudulent, . . . 533
- A and M were partners when the goods were invoiced, before the contract, M sold his interest in the partnership effects to B, held that A and B could sustain the action, . . . 535
- Reputed ownership in A, under such a contract, does not justify a creditor of A in taking the goods, unless under the statutes of bankruptcy, . . . 533
- Possession of goods by any other than the real owner, is neither fraudulent or a badge of fraud, if the want of possession is fairly accounted for, and there is no fraud in fact, . . . 533, 534
- When a delivery of goods is a sale or a consignment, . . . 532, 533

SEAL OF A STATE. *Vide* EVIDENCE. PRIVATE. *Vide* BONDS.**SEA STORES.**

- Cordage, ravenstuck and sail cloth found on board of a vessel on her return from a voyage, are not sea stores within the forty-fifth section of the collection act of 1799, . . . 504, 507
- If intended for the use of the ship, they are a part of its tackle, apparel or furniture; if not, they are a part of the cargo, . . . 507
- On an information against specific articles, as *sea stores* forfeited, the court cannot adjudge them to be forfeited as a part of the cargo or merchandise, or as a part of the tackle, &c. of the ship, . . . 509

SECRETARY AND DEPARTMENT OF STATE (*Vide* EVIDENCE. FOREIGN MINISTER), . . . 238**SLAVES, ABSCONDING.**

- On a question of slavery or freedom, the same rules of evidence prevail as in other cases concerning the right to property, . . . 577
- A bill of sale is not necessary to pass the right to a slave, . . . 577
- A citizen of another state, from whom his slave absconds into this state, may pursue and take him without warrant, and use as much force as is necessary to carry him back to his residence, . . . 577, 585
- Such slave may be arrested on a Sunday, in the night time, and in the house of another, if no breach of the peace is committed, . . . 580, 593
- This right of the master results from his ownership and right to the custody and services of the slave by the common law, and the eleventh section of the abolition act of 1780, and other laws of this state. It is the same right by which bail may arrest their principal in another state, . . . 578, 585
- The constitution and laws of the United States do not confer, but secure this right to reclaim fugitive slaves, against state legislation, . . . 579, 594, 597
- It is no offence against the laws of this state for a master to take his absconding slave to the state from which he absconded, the offence consists only in taking a free person by force under the act of 1800, or the act of 1788, . . . 582, 590
- No person has a right to oppose the master in reclaiming his slave, or to

SLAVES, ABSCONDING—CONTINUED.

demand proof of property. A judge or magistrate cannot order his arrest or detention, without oath, warrant, and probable cause, . . . 579, 599
The master may use force in repelling such opposition, or the execution of such order, and the officer who gives such order, and all concerned in its execution, are trespassers, 591, 598

STALE DEMANDS. *Vide* AMENDMENT.

Stale demands will not be enforced in equity, 418, 495, 569

STATE LAWS, WHEN RULES OF DECISION. *Vide* ACTS OF ASSEMBLY.

State laws relating to process, practice or the modes of proceeding before or after judgment, are not within the thirty-fourth section of the judiciary act, 273, 274, 511
But laws which prescribe a rule for the judgment to be rendered between the parties on questions of right, property and title, whether adopted before or after the passage of the judiciary act of 1789, are within it, . . . 273, 275
State laws limiting the time of bringing actions, recording deeds, docketing judgments and regulating their lien, are binding in the federal courts, 273, 274
They must decide on state laws of this description precisely as state courts do, unless the laws, treaties or constitution of the United States provide for the case, 71, 72, 274, 301, 449

STATE COURTS, DECISIONS OF.

The settled construction of a state law, by the highest court of the state, is considered by the federal courts as their rule of decision under the thirty-fourth section of the judiciary act, such construction being taken as a part of the law, 285
The thirty-fourth section of the judiciary act will be liberally construed so as to administer the jurisprudence of the states as state courts do, both in the construction of statutes and constitution of the states, and on questions of local common law or usage, 284
When the supreme court of the United States have settled the construction of a state law relating to titles to land, they have adhered to it though the courts of the state have afterwards decided differently, . . . 285

STATES, BOUNDARIES OF.

The charter boundaries of New Jersey and Pennsylvania do not extend beyond low water mark in the Delaware, 72, 73

SUITS AT COMMON LAW, WHAT ARE. *Vide* CASES AT LAW.

TAXES. *Vide* TRUSTEE.

TRESPASS. *Vide* DAMAGES. INJUNCTION.

The assignee of a bill of lading, who holds the goods as security for money lent on respondentia, has a right to enter them at the customhouse, on giving security for the duties, though the borrower is in debt for duties due on former importations, and may maintain trespass against the marshal for taking them under an execution by the United States on a judgment for such duties, 139, 140

TRESPASS—CONTINUED.

Where two or more persons agree to commit, or unite in the commission of an unlawful act, each who is present, or advises, consents, or in any way aids, assists, or consents to the act, is liable in trespass, . . . 600, 601
 When a judge, justice of the peace and officers are trespassers, . . . 580, 581, 601

TRIAL BY JURY, . . . 112, 117, 222, 404, 407, 548, 551, 554, 568

TROVER. When and by whom it lies (*Vide* SALE OF GOODS), . . . 535

TRUST. When cognizable in equity, . . . 422

TRUSTEE. *Vide* MARRIAGE CONTRACT, &c.

Where land was conveyed on an undefined trust, the trustee is bound to manage it with the same diligence as he does his own property, but will not be held to a stricter rule, . . . 162

A trustee is bound to pay taxes on the trust property, if in funds. He may advance his own money for taxes, so long as he retains the property, and charge the amount upon it, . . . 162

He is not answerable to the representatives of the cestui que trust for any improvements made by his directions, or with his approbation, out of the proceeds of sales, . . . 162

A trustee may charge the trust with fees paid for professional advice, touching the execution of the trust, but not for professional services rendered in the litigation of his accounts, . . . 162, 163

A trustee is, in Pennsylvania, entitled to a compensation for his services by way of commission, though there is no provision to that effect in the trust deed, or by agreement of parties, . . . 163

A trustee is not chargeable for not renting property which was not productive when it came to his hands; nor bound to enclose land which was open, unless directed so to do by the cestui que trust, . . . 163, 164

A trustee who acts in good faith in selling trust property, is justified in selling for the fair market value, though it may not be equal to what its peculiar situation would make it worth to one whose land it adjoins, . . . 164

Where the trust is general, and no mode of sale prescribed, the trustee may sell at private sale, . . . 164

A trustee cannot be charged for any negligence or mal-administration of the trust which is not set forth in the bill, but it may be considered by the court in fixing his compensation, by way of off-set, not as a substantive claim, . . . 163

In Pennsylvania all trustees are entitled to a commission on moneys passing through their hands; the usual rate is five per cent, any departure therefrom is under special circumstances, . . . 386

If a partner who has committed frauds on the firm agrees to indemnify the injured party to his satisfaction, by an assignment of all the partnership effects for his indemnity, such assignment will be construed liberally in his favour, and will be reformed in equity so as to meet the intention of the parties in conformity with their agreement, . . . 386

But the injured party will not be allowed to be the judge of his indemnity, . . . 388

As a trustee he will be confined to such satisfaction as a court of equity deem reasonable, . . . 388

If the books and papers of the firm have been destroyed or suppressed,

TRUSTEE—CONTINUED.

- false entries made in them, or no entries made by the partner who has charge of them to his debit, with a view to fraud, the injured partner may support a specific charge by his own affidavit, but not by one which specifies no amount under any particular item, 389, 390, 392
- On a bill by the fraudulent partner for an account, the master may charge him on any evidence which is competent or admissible as proof of the item; he cannot hold the injured partner to such degree of proof, as would justify a charge under ordinary circumstances, against a customer or partner; there must however be some proof, 391

USAGES AND PRINCIPLES OF LAW. *Vide* COMMON LAW.

- USE.** When executory, 363

VARIANCE. *Vide* CRIMINAL LAW.

- Variance between agreement and instrument drawn to effectuate it, 386, 488, 496

VENIRE FACIAS. *Vide* JURY.

WARRANT. On criminal accusations. *Vide* SLAVE.

- Constitutional provisions relating to granting warrants, 590
- Difference between an arrest with and without warrant, 580
- When a warrant is void, 580, 591, 594

WILL, CONSTRUCTION OF. *Vide* LAND. LEGACY.

- In construing a will we must first look to the particular clause in question, at the same time taking into our view the whole instrument, endeavouring to give meaning and effect to every part of it, 459
- Testator devised to his daughter G. two houses and lots, "she permitting at the same time, her mother to *occupy and dwell* in the better of them for and during her natural life." This is not a grant in the beneficial interest in the house to the mother, so that she may either occupy it herself, or let it to another, receiving from it the rents it produces. It is a permission to her to live and reside in the house, and entitles her to no other use and enjoyment of it, 459
- The executors of the mother were ordered to account for the rents, issues and profits received by her from the house, allowing her for expenditures for repairs, &c., and provided that the account should not extend back beyond six years from the filing of the bill, 460

WITNESS. *Vide* EVIDENCE.

THE END.

ERRATA.

- Page 58, last line, for situation of the transaction read the situation of the son, after the transaction.*
- Page 64, line 11, from the bottom, for some read seven.*
- Page 83, line 14, from the top, for 2 Mass. Rep. read 2 Mason's Rep.*
- Page 91, line 11, from the bottom, for attached read attacked.*
- Page 94, line 8, from the bottom, read within the terms of the law, making, &c.*
- Page 102, line 5, from the top, for for read or.*
- Page 102, line 5, from the bottom, for party read parties.*
- Page 111, line 12, from the top, for absolute read obsolete.*
- Page 112, line 18, from the bottom, for villas read villes.*
- Page 112, last line, for absolute read obsolete.*
- Page 114, line 18, from the top, for villa read ville.*
- Page 115, line 7, from the top, for the time is not read though time is not.*
- Page 117, line 2, from the top, for 3d section of the 8th article read 2d section of the 3d article.*
- Page 124, top line, for amenable read amendable.*
- Page 124, line 11, from the bottom, for qualis read quales.*
- Page 183, line 4, from the top, for depend read descend.*
- Page 201, line 9, from the top, for them read then.*
- Page 206, line 15, from the top, for unincident read an incident.*
- Page 208, line 17, from the top, for Jac. Law Dig. read Jac. Law Dict.*
- Page 210, line 2, from the top, for divesting read diverting.*
- Page 249, line 12, from the top, for feoffer or feoffers read feoffee or feoffees.*
- Page 254, line 9, from the bottom, for sheriff's sale read sheriff's deed.*
- Page 255, line 8, from the top, for property barred read property bound.*
- Page 276, line 6, from the top, for packeted read pocketed.*
- Page 337, bottom line, for instruction read intention.*
- Page 338, line 10, from the top, for of cotton or the price read of cotton on the price.*
- Page 349, line 2, from the top, for tested read treated.*
- Page 403, line 11, from the top, for 1798 read 1789.*
- Page 478, line 16, from the bottom, for Mr Chew's heirs read Mrs Chew's heirs.*
- Page 480, line 15, from the top, for force read fine.*
- Page 482, line 20, from the top, for interest read intent.*
- Page 494, line 16, from the top, for 1 Call 849 read 1 Call 84, 89.*
- Page 522, line 8, from the top, after but, add "it is contended," that it is, &c.*
- Page 527, line 7, from the top, for influence read inference.*
- Page 564, line 5, from the bottom, for referred read reserved.*
- Page 567, line 19, from the top, for price read service.*
- Page 570, line 7, from the top, for seasonable read reasonable.*
- Page 589, line 2, from the top, for and arrest read and punish.*
- Page 594, line 3, from the bottom, for serve read service.*

Stanford Law Library



3 6105 063 916 311

